QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

January 1, 1945

Through March 31, 1945

Volume XXXVIII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1945, through March 31, 1945.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive Officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

WILLIAM N. McQUEEN,

Acting Attorney General.

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OPINIONS

January 17, 1945.

Hon. G. W. Thompson

License Inspector

Montgomery, Alabama

The operation of a motor vehicle with improper license tag upon public highways of this State subjects the operator thereof to citation, etc.

It is the duty of the license inspector to proceed against such person as may have operated a motor vehicle upon the public highways without proper license tags.

A subsequent owner of a motor vehicle is not subject to citation due to illegal operation by a person prior to acquisition thereof.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of December 22, 1944, is as follows:

"I am desirous of having your ruling on the following points in the motor vehicle laws of the state of Alabama.

"(1) Is a person operating a motor vehicle in other states after November 15, 1944, with a 1944 Alabama license tag and such person subsequent to November 15th drives this motor vehicle back into the state of Alabama subject to penalties and a citation fee, if cited by the License Inspector?

"(2) When a dealer in motor vehicle buys a used automobile, which has been in service since October 1, 1944, and such an automobile has been continuously operated up to and subsequent to November 15, 1944, and under the above condition would this motor vehicle be subject to penalty and citation fee, if cited by License Inspector?

"(3) With reference to question number 2, should the motor vehicle dealer or the purchaser of such motor vehicle be called upon to pay accrued penalties and etc?

"Your usual prompt attention will be greatly appreciated."

Your attention is called to Section 835, Title 51, Code of 1940, which pertinently provides as follows:

"* * * * * * * * (a) If the license inspector shall discover any motor vehicle being operated without a proper or legal license, he shall **cite the operator** of the motor vehicle, and in filing copy of such citation with

the probate judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof. (b) The judge of probate must in all cases in addition to the other penalties required to be collected by him, collect the citation fee, if any, due the license inspector before issuing any license, and in case of motor vehicle where a license is taken out in the name of a person not cited the citation fee shall be collected if citation filed shows the motor number of such vehicle. When any license is due the license inspector shall cause the **delinquent** to appear before the probate judge of the county and take out same, but such probate judge shall not have authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this title. If such delinquent shall fail or refuse to take out license, the license inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any court having jurisdiction of such offense." (Emphasis added.)
Section 693 of the same Title provides in part as follows:

" * * * * and that before any private automobile or any motorcycle shall be used on any public highway the proper license tag therefor must be procured and securely attached to the rear and front end of the automobile or motorcycle, said tag to be securely attached right side up with the number thereof in an upright position and the numbers thereof plainly visible."

After a careful perusal of the involved statutes, it is my interpretation that they were adopted as a means to assure payment of the license prior to operation of a motor vehicle upon the public highways; to set up legal machinery for the citation and criminal prosecution of a person operating a motor vehicle not properly licensed, and also to provide for the imposition of a penalty (and citation fee) upon a delinquent. The offense denounced by the statute is the operation of a motor vehicle upon public highways without proper license tags. The duty of the license inspector as defined by the statute is to proceed against the **operator.**

In view of the above, it is my opinion that your first inquiry should be answered in the affirmative.

Under the factual situation outlined, the driving of the motor vehicle back into Alabama necessarily involved the operation of a motor vehicle upon the public highways with an improper license tag, thereby subjecting the operator to citation, etc.

In answer to your second inquiry, it is my opinion that you may cite the person who engaged in the illegal operation of the motor vehicle whether he be the prior owner or the dealer. In other words, you proceed against the person and not the automobile. I do not believe that a dealer who has not operated a motor vehicle upon the highways without proper license tags would be subject to citation due to illegal operation by a prior owner. The statutes do provide for the collection of a penalty, in addition to the license, from whomsoever may purchase a license tag for the particular motor vehicle, but I find no provisions authorizing the citation of a subsequent owner of a motor vehicle who was not a party to the illegal act. Our courts have held that the penal provisions of Section 835, supra, are strictly construed. **Stewart v. Gilli-**

land, 219 Ala. 32, 121 So. 35; **McNeel v. Stiles,** 224 Ala. 181, and a strict construction of the statute does not permit such a citation.

I believe that the above answers your third inquiry. However, a specific answer is that you proceed against the person you find operating the motor vehicle upon public highways without proper license tags.

Yours very truly,
WILLIAM N. McQUEEN,
Acting Attorney General.

January 19, 1945.

Hon. Chester Walker

Judge of Probate

Tuscaloosa County

Tuscaloosa, Alabama

Code 1940, Tit. 51, §§ 3, 4—Taxation—Exemptions—Industrial Plants—

A county governing body may exempt from taxation within the limits of Code 1940, Tit. 51, § 3 all such improvements, machinery and equipment as may have been or may thereafter be constructed or installed for the purpose of constructing, extending or adding to an industrial plant mentioned in said section, provided at the time of exemption proper application has been made therefor and no prior lien for taxes has attached to the property so to be exempted.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 8, 1945, is as follows:

"On September 25, 1943, Reichhold Chemicals, Inc. filed with the Board of Revenue of Tuscaloosa County, Alabama, the petition, a copy of which is hereto attached marked Exhibit 'A', and on September 25, 1943, the Resolution, a copy of which is hereto attached, marked Exhibit 'B', was unanimously adopted and passed by said Board of Revenue.

"On January 15, 1944, said Reichhold Chemicals, Inc. duly made and filed with the Tax Assessor of Tuscaloosa County, Alabama, its ad valorem tax return. On this tax return it listed property valued as follows:

"Real Estate	$ 2,700.00
Buildings	218,490.00
Watches and Clocks	200.00
Vehicles, other than motor vehicles	2,163.00

Typewriters, adding machines, calculating machines, and other office equipment	3,805.00
Guns, pistols etc.	32.00
Machinery	306,539.00
Raw materials and supplies on hand	18,696.00
Railroad Spur Track	8,887.00
Mechanical and Electrical Refrigerators	796.00
Gasoline, oil and other tanks, pumps, etc.	144.00

"Written on this tax return over the signature of Reichhold Chemicals, Inc., was the following:

"'All of the above described buildings as well as the property listed on the Personal Property schedule of the return are located on the tract of land herein above referred to, and all of which said buildings, as well as all of the personal property (except the supplies and raw materials listed under item 27 of the Personal Property return schedule) constitute and are parts of the factory, plant, machinery, works, and other equipment of such factory or plant of the taxpayer and have been heretofore, by resolution of the Board of Revenue of Tuscaloosa County, Alabama, exempted from all taxes for County purposes, except for county school and district school purposes, and taxpayer expressly claims the exemption of said property from all taxes for county purposes except the taxes for county school and district school purposes, in accordance with the said resolution of the said Board of Revenue of Tuscaloosa County, Alabama.'

"Subsequent to January 1944 and prior to October 1, 1944, a State Examiner of Public Accounts made an examination of the books of the Tax Assessor and Tax Collector of Tuscaloosa County, Alabama and during the course of its examination, this Examiner of Accounts took the position that the Board of Revenue of Tuscaloosa County, Alabama was not authorized to grant the exemption or to remit the taxes as set forth and shown to the Tax Assessor and Tax Collector of said County that if its officers recognized the exemption from taxation as set forth in Exhibit 'B', he would charge the Tax Collector with all County taxes which he failed to collect from Reichhold Chemicals, Inc.

"Incorporated in his report of said examination was a statement, a copy of which is hereto attached marked Exhibit 'C'.

"The Tax Collector and Tax Assessor of Tuscaloosa County in obedience to the instructions of said Examiner of Public Accounts have refused to recognize that Reichhold Chemicals, Inc. is entitled to any exemption for ad valorem taxes on any of its property for the tax year 1944 and the Tax Collector is insisting upon payment by it of ad valorem taxes on all of its property for all purposes.

"I am reliably informed that on October 1, 1943, the buildings constituting the plant of the Reichhold Chemicals ,Inc. were only about 90% completed; and that its plant had not been physically completed in construction and was not ready for real operation until the late Spring of 1944.

"I am further reliably informed that the only property, exclusive of real estate and raw materials on hand, included in the above referred to tax return which was made on January 15, 1944, which had in fact been

delivered to or which was in possession of said Reichhold Chemicals, Inc., on October 1, 1943, consisting of the following:

"Equipment consisting principally of two boilers and accessories which was the only section of the plant completed and acceptive for operating use as of October 1, 1943	$114,350.00
Railroad Spur Tract	8,887.00
Office Equipment	3,000.00
Miscellaneous uninstalled machinery items	2,363.00
Buildings approximately 90% completed	175,000.00
Total	$303,600.00

"Mr. Carl B. Fritsche, Vice President of Reichhold Chemicals, Inc., in connection with the matter under discussion makes the following statement:

" 'It should be explained that with the exception of a few miscellaneous items, all of our process equipment was fabricated, assembled, and tested in various manufacturing establishments specializing in this type of work located in cities outside of Alabama, and that we had made progress payments on such work, as of October 1st, 1943. However, the great bulk of the process equipment was not delivered, installed, or accepted until after October 1st, 1943 as is evidenced by the fact that the plant cannot be said to have been physically completed and ready for reasonably full scale operation until the late spring of 1944.

" 'During the intervening months we did accomplish some processing of a minor nature but of only adequate volume necessary to train a green personnel which had had no previous experience in chemical operation.

" 'It is evident therefore that the major portion of the value assessed for tax purposes against the plant represents work done and accepted following the action of the Board of Revenue of Tuscaloosa County on September 25th, 1943, when such Board unanimously passed a resolution limiting for a period of eight years beginning October 1st, 1943, the taxes on subject plant for all county purposes except for county school and school district purposes, assessed or to be assessed, on the factory equipment, etc., of subject plant. This action was taken in accordance with the provision of Section 3, et seq.; of Title 51 of the 1940 Code of Alabama. The purpose of this act of course was and is to encourage the establishment of new industrial enterprises in the State of Alabama.

" 'It should be stated that this provision of law was brought to my attention during the winter of 1942 when on behalf of Reichhold Chemicals, Inc., and at the request of the War Department, I surveyed some ten southern cities in order to choose a location for such plant, and that this friendly provision of law was a factor upon which the company relied in choosing Tuscaloosa as its location.

" 'In conclusion, while it is true that our plant is now operating under Governmental Contract W-ORD-650 with 100% of its production scheduled for delivery to Army Ordnance for the duration of the war, it is our hope not only to convert the present plant over to useful peace-time

service when the war is over, but also to expand its activities substantially. All of which will aid in relieving the local serious unemployment problem when we are faced with demobilization of the armed forces and of war industries. The continued cooperation of Governmental Agencies will be of substantial help in aiding this contemplated expansion of plant facilities particularly with respect to the tax exemption provided for in the 1940 Code of Alabama.'

"If it continues to be insisted that the exemption granted by the Board of Revenue of Tuscaloosa County, Alabama be ignored, then I am advised that it is the purpose of Reichhold Chemicals, Inc. to pay the taxes demanded of it under protest and to promptly sue for the recovery of that part of said taxes which were remitted or as to which it was granted exemption by the Board of Revenue of Tuscaloosa County. All of the officials of the County are desirous that the exemption granted be recognized and desire not to have litigation with reference thereto.

"I therefore ask that you as promptly as possible give me your opinion as to the following:

"1. Under the facts as herein set forth, is Reichhold Chemicals, Inc. entitled to exemption from taxes for all county purposes, except for county school and school district purposes, assessed, and/or to be asssesed, on and against its factory, plant, machinery and works, and all other equipment of such factory or plant and all extensions thereof, and additions thereto, erected or to be erected on the tract or parcel of land situated in Tuscaloosa County, Alabama and described in Exhiibts 'A' and 'B' hereto attached?

"2. If, in your opinion ,it is not entitled to such exemption as to its entire factory, plant, machinery and works, and other equipment, then is it entitled to exemption from ad valorem taxes for all county purposes, except for county school and school district purposes, assessed on and against that part of its factory, plant, machinery and works, and other equipment thereof, which had not been delivered to it and which was not in its possession on October 1, 1943?

"Your prompt attention to this matter will very much oblige."

County governing bodies are authorized under certain conditions and to a limited extent to exempt industrial plants, (exclusive of land) their machinery and equipment from county taxes for a period not exceeding ten years, beginning, in the case of foreign corporations, with the date of their qualification to do business in Alabama, or from the **date of completion** of the plant or of an addition thereto or extension thereof. Acts 1939, p. 529 (Code 1940, Tit. 51, § 3.)

The exemption is granted, or denied, by the county body, upon application by the taxpayer, by an order spread upon its minutes. The contents of such application are prescribed by statute and in case of foreign corporations must show the location of its plant and the date when it qualified to do business in Alabama. The order made thereon, if granted, must show when the exemption will expire. (Code 1940, Tit. 51, § 4).

In the present instance the application and the order granting the same were drawn in strict compliance with the statute and show that the taxpayer, a Delaware Corporation, qualified to do business in this State on May 12, 1942; that the application for exemption was made and an order granting same was entered on September 25, 1943, at which time the plant had not been completed or put in operation, and that the exemption would expire October 1, 1951. There is nothing on the face of the application or the order to indicate that the county governing body exceeded its jurisdiction in making the order or that the order was infected with fraud, accident or mistake.

County governing bodies in the exercise of such power and jurisdiction necessarily exercise a quasi judicial function or discretion. They may either grant or refuse the application, as they deem best for the county's interest and the public interest. And their orders, in the absence of fraud, accident or mistake, apparent on their face, or in the absence of anything to show a lack of jurisdiction apparent on the face of application or order, should, until impeached in a court of competent jurisdiction, be accorded the force and effect of a judgment, in accord with the presumption of law as to public officers and bodies that they have performed a duty required by law when their records so import. **Wiley v. Wilhite,** 201 Ala. 638, 79 So. 110, **Grayson v. Schwab,** 235 Ala. 398, 401; **Barry v. Stephens,** 176 Ala. 93, 57 So. 467; **Gamble v. Andrews,** 187 Ala. 302, 65 So. 525.

It is to be presumed also that in exercising such discretion and jurisdiction the county governing body, before making an order, had a hearing upon the application ,and informed itself as to the facts and circumstances sustaining the application or operating as a basis for denial.

Accordingly in an opinion to the Tax Collector, Mobile County, dated December 11, 1942, Quarterly Report, Vol. 29, p. 91, this office ruled that the Tax Collector was not authorized to determine whether under Code 1940, Tit. 51, § 5 the taxpayer had forfeited an exemption; that it was for the county body alone to annul the order of exemption, and that in the performance of his duties the tax collector should be guided solely by the order of the county body.

It would seem equally clear in the present instance that the Tax Assessor and the Tax Collector alike must look to the orders of the county board exclusively as to such exemptions, unless and until they are impeached in a court of competent jurisdiction, rather than to the opinions or suggestions of others which run counter to such orders.

Nor do I think that it is within the province or scope of duty or employment of a state examiner of public accounts to pass upon the validity of the orders of a county governing body as to exemptions granted to industrial plants, or to threaten the tax collector or assessor that if they "recognized the exemption * * * he would charge the Tax Collector with all county taxes which he failed to collect from Reichhold Chemicals, Inc.," as stated in the request for this opinion.

Such tax officials, if in doubt as to their duties in the premises, may request the opinion of this office, as may also the public examiner of accounts through the Chief Examiner of Accounts, and such opinion, if followed, will protect them from personal liability. An examiner of accounts is certainly

not authorized to furnish legal opinions construing statutory law as to matters of taxation.

The statute under which such exemptions are granted by county governing bodies (Title 51, § 3, supra) is broad and comprehensive in its terms and vests in them a wide discretion. As already noted the exemption may cover a period of ten years, and if the applicant is a foreign corporation may begin when it qualifies to do business as such, **or** "from the date of completion **of** such plant or factory, **or** from the date of completion of such adition or extension thereof." The legislature obviously considered **"the date of completion"** as a proper date for the beginning of the exemption, and considered that whatever was done prior thereto was merely preliminary and preparatory to completion.

Whatever machinery and equipment may have been installed, or whatever construction may have been done prior to grant of exemption on September 25, 1943, so far as appears was not at that time subject to any lien for taxes for the tax year beginning October 1, 1942, and could not ,of course, at that time be subject to such lien for the tax year to begin October 1, 1943, thereafter.

The order of September 25 did not operate to destroy any lien then in existence and in no way conflicted with Section 100 of the Constitution. It did operate, however, as I see it, to prevent any lien from attaching on October 1, 1943, for 1944 taxes, which otherwise would have attached but for the grant of exemptions on September 25. **Pullman Co. v. Hamilton,** 229 Ala. 184, 155 So. 616; **Hamilton v. Pullman Co.,** 231 Ala. 7, 163 So. 329; **Pullman Co. v. Hamilton,** 236 Ala. 209, 181 So. 244.

I am of opinion therefore that the county governing body acted within its authority in making its order on September 25, and that unless and until said order is challenged or impeached on some valid ground in a court of competent jurisdiction it should be observed and followed by the taxing officers of the county. Whatever objections, if any, there may be to the taxpayer's assessment should be made in an orderly way and in the manner provided by law.

In conclusion, the answer to your question numbered 1 is "yes," for as stated hereinabove, it appears from the facts that no lien for taxes had attached prior to the order granting exemptions. This will serve as an answer also to the second question. In other words the exemption applies to all property, exclusive of land, not subject to tax lien at the time exemptions are granted.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 23, 1945.

Hon. L. B. Stephens

Administrative Assistant

Board of Pardons and Paroles

Montgomery 5, Alabama

Code 1940, Title 45, § 222—Insane Prisoners—

1. Governor not authorized to order transfer of insane prisoner to any hospital other than a State hospital for the insane as provided by Code 1940, Title 45, § 222.

2. State Board of Pardons and Paroles not authorized to parole an insane prisoner for the sole purpose of receiving treatment in a hospital for the insane.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 17, 1945, is as follows:

"The Board has asked that I request your official opinion on the following:

"1. When a prisoner who is serving a sentence in the penitentiary or is sentenced to be confined to hard labor for a county later becomes insane, can he be legally ordered transferred by the governor under Title 45, Sec. 222, Code of Alabama 1940, to a hospital for the insane within the State of Alabama other than the State Hospital for the insane, such as those operated by the Veterans Administration or privately operated sanitoriums?

"2. Can the insane prisoner be ordered transferred by the governor to a hospital for the insane outside of the State of Alabama?

"3. If your answer to the above is in the negative, does the State Board of Pardons and Paroles have authority to parole an insane prisoner for the sole purpose of receiving treatment in a hospital for the insane?

"The reason for making the above request is that the Board now has two such matters pending."

For answer to questions 1 and 2, supra, I am of opinion that the Governor is without authority under Code 1940, Tit. 45, § 222 to order an insane prisoner to be transferred to any hospital other than a State hospital for the insane. Such is the clearly expressed intent and effect of the statute itself.

For answer to question numbered 3 I am of opinion that the State Board of Pardons and Paroles is without authority to parole an insane prisoner for the sole purpose of receiving treatment in a hospital for the insane. See opinion to State Board of Pardons and Paroles, February 19, 1940, Quarterly Report, Attorney General, Volume XVIII, page 257.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 6, 1945.

Hon. G. H. Boyd

Register, Tenth Judicial Circuit

Equity Division

Birmingham, Alabama

TAXATION

REDEMPTION FROM STATE OF LANDS SOLD TO IT FOR AD VALOREM TAXES.

1. Where the State purchases land sold by it for ad valorem taxes due the State and is then in possession thereof application for redemption must be made to the Probate Judge of the county in which the land is located.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of January 25, 1945, is as follows:

"In re:—Tax Redemption from State on the following described property:

"7 acres lying N of old Montgomery Highway SE of and S adj 4½ acres owned by Luther Patton in NW ¼ of SE ¼ of sufficient width to compose 7 acres of W side of that part of NW ¼ of NE ¼ of Huey and E of Patton Sr. Sec. 13, Tp. 19, Range 3.

"I would appreciate an official opinion from your office based on the following:

"In 1939 Frank A. Holle, now in military service, purchased from the State the above property, which was sold to it in the usual manner for 1937 taxes. The sale was made in the Bessemer Division of this county. The property at the time of the sale was owned by Mary H. Denson. At that time, this and other Denson property was in litigation in the Circuit Court at Birmingham. The sale to Mr. Holle was made at Bessemer due to an Act of the 1937 Legislature, placing this particular property in the Bessemer Cut-Off by a slight change in the line dividing the two portions of the county. Apparently the Bessemer office had not been notified of the pending litigation at Birmingham.

"These properties had been in tax litigation for a number of years and on the 3rd day of May, 1943, the Equity Division of the Circuit Court here ordered the identical property sold for delinquent taxes accruing during the years 1932, 1933, 1934 and 1935. The state purchased at the sale which was made by the Register. The litigation got into the Equity Division here by way of an appeal from the Probate Court.

"I am advised by Mr. W. A. Holle, the father and agent of Frank A. Holle, that he has paid all taxes on said property accruing since his purchase in 1939. He now wishes to redeem the property from the sale by the Register and has made a demand upon me, as Register, to permit him to do so. It is my information that Mr. Holle has endeavored to redeem through the Probate Office and that redemption there has been refused. So far as I can determine, the statutes do not specifically provide for a redemption from the Register who made the sale.

"It is my opinion that he can redeem or purchase directly from the state. However, I have been unable to find any opinion of the Attorney General, or any cases to substantiate that view. I am therefore asking you for an official opinion on the following questions:

"1. Where in 1939 a person purchased property from the state which it bought for delinquent taxes accruing during the year 1937, at which time the identical property was in litigation in the Circuit Court on account of delinquent taxes accruing during the years 1932, 1933, 1934, and 1935, how can such person redeem the property which was later sold by the Register of such court by authority of its decree and purchase by the state at such sale on the 25 day of August, 1943?

"2. How can a person redeem property sold for state ad valorem taxes by order of the Equity Division of the Circuit Court?

"The answer to the first question may answer the last. However, I'm sure the question will arise in the future by demand of a former owner and wish to be advised on the procedure."

Your letter indicates that a party purchased the property described in your letter from the State in 1939; that this property had been sold for ad valorem taxes to the State for the year 1937; that at the time of this purchase legal proceedings were pending to enforce the collection of ad valorem taxes on this same property for the years 1932, 1933, 1934, and 1935. This litigation terminated by sale of the land to the State in 1943. We assume that the

proceedings were legal and confine this opinion to the question, To whom must the person purchasing land from the State for the 1937 taxes apply for a redemption of the property sold for the taxes for the years 1932-1935?

The right to redeem is not a vested one, but is a mere privilege granted by the legislative enactments. It is the settled law that in order to acquire the benefit of such privilege the method and terms of the statute mark the remedy, and the sole remedy.

It clearly appears from Sections 304, 305, 310, 312, and 324, Title 51, of the Code of 1940, that the party seeking to redeem from the State lands sold to it, the redemptioner must make application to the Probate Judge of the county in which the land is located.

Sections 304 and 312 have been amended by Acts of 1943, pages 580 and 582, but the amendments do not affect the question here under review. If the State was the purchaser and is the owner of the land under the tax sale, these sections must govern. There is no law authorizing the redemptioner to apply to the Register of the Circuit Court for redemption.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 6, 1945.

Hon. Johnnie I. Shugart, Clerk

Inferior Court of Ensley

Lindsey Building

Ensley, Alabama

Inferior Court of Ensley can tax and collect a fee of fifty cents for docketing each case.

Inferior Court of Ensley cannot tax defendant with a solicitor's fee, where the solicitor does not appear and prosecute the case.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1944, is as follows:

"Will you please give me your official opinion on the following:

"Section 7 of Acts No. 193, Local Acts Extra Session 1932, page 76, creating the Inferior Court of Ensley, provides for a fee of 50 cents to be taxed and collected as a fee for docketing each case in said Court.

"Title 11, Section 38, fixing Justice of the Peace Court costs, provides for a docketing fee of 10 cents.

"This office has always taxed both of the above fees as docketing fees, that is, a 60 cent docketing fee in each case.

"Section 17, of Acts No. 193 above referred to provides, among other things a solicitor's fee of $2.50 for misdemeanor cases. This fee is not being taxed at present, as no solicitor has been appointed by the County Commission as provided for in said paragraph.

"Occasionally in important and strongly contested cases the Court requests the County Solicitor of Jefferson County to send an Assistant Solicitor out to prosecute the case. The Solicitor has always told the Judge that he would send an Assistant if he had one available, and he does furnish one if he is able to do so. The State Examiners tell us that they are of the opinion that this solicitor's fee should be collected in each case where a fine is imposed.

"Please advise me by your opinion as to whether it is legal and my duty to tax the 50 cents fee provided by Section 7, of Acts No. 193, together with the 10 cents fee provided for by Title 11, Section 38, in each case.

"Also whether to tax in each misdemeanor case where a fine is imposed a solicitor's fee of $2.50 as outlined by Section 17, of Acts No. 193."

In my opinion you cannot tax the costs of docketing cases under both the provisions of the local law and Section 38, Title 11, Code of 1940. There is a decided conflict between the two laws, and both cannot stand. The survival of a local statute over a general law as to costs in an Inferior Court was ably discussed by the Court of Appeals in **Smith v. State**, 19 So. 2d. 546 (Advance Sheet No. 13, 19 So. 2d. 546), from which I quote:

" * * * It is not controverted that defendant, appellee, collected fees, during the time mentioned, in exact accordance with the provisions of the Local Act of the Legislature approved February 3, 1899, supra; but the appellant is claiming that the excess for which it is suing arose by virtue of the scale of fees adopted by appellee being higher than that provided by the general law.

"It is unquestioned that the act approved February 3rd, 1899, Local Acts 1898-99, p. 563, supra, was valid legislation at the time it was enacted. But appellant contends that the same was repealed by the adoption of the Code of 1907, or of that of 1923, or of that of 1940.

"But Section 10 of the Code of 1907 expressly provides that 'Local, private, or special statutes * * * are not repealed by this Code.' See Brandon, Auditor v. Askew, Solicitor, 172 Ala. 160, 54 So. 605. To the

same effect is Section 11 of the Code of 1923, and Title 1, Section 9 of the Code of 1940.

"(1) It being admitted that defendant has pursued the method directed in Local Acts 1898-1899, p. 563, supra, in the matter of costs, and it being plain that by the act creating the court of which he is judged he was directed so to do (Section 6 of Local Acts 1915, p. 297), it is at once apparent that he is due the State and County nothing."

The law pertaining to costs and fees is penal in nature and is strictly construed. **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503, **State v. Stone,** 233 Ala. 243, 171 So. 366. I know of no authority whereby two costs may be collected for one act, and in view of the above hold that a fee of fifty cents should be charged and collected for docketing each case in your Court, pursuant to the local act. Section 38, supra, has no application here.

Section 15 of the Act creating your Court reads, pertinently:

"There shall be taxed as a part of the costs in each misdemeanor case tried in said court, a solicitor's fee of $2.50, and in all felony cases a solicitor's fee of $5.00, which fees shall be collected as other costs are collected in such cases, and paid into the County Treasury of Jefferson County, Alabama."

In April, 1944, an opinion was rendered to the effect that solicitor's fees prescribed by Section 50, Title 8, Code of 1940, should not be taxed when the solicitor failed or refused to prosecute (Quarterly Report of the Attorney General, Vol. 35, page 18). I find no decision rendered by the Courts of Alabama dealing with this proposition, and have conducted a most diligent search through available authorities and am able to find only two cases wherein this question was presented to a Court. In the case of **Allen v. Davis, Pros. Atty., et al.,** 211 S. W. 151, Justice Humphries, speaking for the Supreme Court of Arkansas, said:

"(1-3) This court is committed to the doctrine that fees can only be taxed as cost when authorized by statute, and that statutes allowing such fees 'are to be strictly construed and pursued.' Badgett, Ex parte, 6 Ark. 280; Hanna v. Pitman, 25 Ark. 275; Cole v. White County, 32 Ark. 45; Fanning v. State, 47 Ark. 442, 2 S. W. 70; Logan County v. Trimm, 57 Ark. 487, 22 S. W. 164; Peay v. Pulaski County, 103 Ark. 601, 148 S. W. 491. The only authority for the allowance of fees to the deputy prosecuting attorney is to be found in sections 3488 and 6390 of Kirby's Digest, and in section 3, Act 220, Acts 1905, amending section 6389 of Kirby's Digest, which latter amended section is applicable to certain counties, including Craighead, where these gaming cases were filed. The change made in section 6389, Kirby's Digest, by amendment, did not affect the construction placed upon that section by this court in the case of Peay v. Pulaski County, supra. It was decided in that case, under sections 3488, 6389, and 6390 of Kirby's Digest, that deputy prosecuting attorneys were entitled to fees only when they were present and prosecuting, and that a justice of the peace had no authority or jurisdiction under said sections to render judgment in favor of deputy prosecuting attorneys unless they were present and prosecuting. In the course of the opinion, the court took occasion to say:

" 'The presence of the prosecuting attorney, or his deputy in person, under the above statutes (referring to the statutes above cited) is essential to his right to recover the fee in the first place, and also to the jurisdiction of the justice to render a judgment in his favor for such fee.'

"The undisputed facts in the instant case show that the deputy prosecuting attorney was not present on 6th day of October, 1917, when the defendant Luther Cato in the gaming cases appeared and entered a plea of guilty in each of the cases; that the court was not opened and the cases prosecuted or pleas of guilty accepted on the 16th day of October, to which time the cases had been continued, and at which time the deputy prosecuting attorney was present. We think, under the facts, the instant case is ruled by the case of Peak v. Pulaski County, supra."

In view of the above, it is my opinion and I hold that where no solicitor appears to prosecute cases in your Court you cannot tax the defendant with a solicitor's fee.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 6, 1945.

Dr. Raymon R. Paty, President

University of Alabama

University, Alabama

The University of Alabama, Department of Biology, may, under the supervision of the Board for Distribution and Delivery of Dead Bodies, use cadavers in connection with the Anatomy and Physiology courses.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of January 16, 1945, is as follows:

"Will you please, in your official capacity, give the University of Alabama your opinion as to whether the Department of Biology of the University can legally, under authority of an act of the Legislature (1923 General Acts of Alabama, No. 360-S171. Foster-Page 381), use cadavers in connection with the Anatomy and Physiology course in said Biology Department for medical technicians, dieticians, and physical education students.

"I enclose herewith a letter from Dr. Henry Walker, Head of the Department of Biology, dated January 5, 1945, addressed to his dean, Dr. Martin ten Hoor, explaining in detail the purposes for such use of dead bodies. It would be of assistance to the University of Alabama if the act could be construed to be broad enough to permit the Department of Biology to use cadavers for the purposes indicated, but if, in your opinion, the act is not broad enough to permit this, then it will probably be desirable for the act to be amended at the forthcoming meeting of the Legislature.

"Thanking you very much for your valuable assistance."

In my opinion the University of Alabama, Department of Biology, may, under the supervision of the Board for Distribution and Delivery of Dead Bodies, use cadavers in connection with the Anatomy and Physiology courses.

The provisions of the Act you cite now appear as Sections 174, et seq., Title 22, Code of 1940, and in rendering any interpretation of its provisions I find it of material assistance to look to the history of this particular legislation, a practice often followed by the Courts. (See **Abranson v. Hard,** 229 Ala. 2, 155 So. 590, **American Bakeries Co. v. City of Opelika,** 229 Ala. 388, 157 So. 206.) It has been held that:

"In case of doubt in respect of an ambiguous legislative context, the preamble of the act may be resorted to, to ascertain the intent and to resolve the doubt." **State v. Board of Revenue and Road Com'rs.,** 202 Ala. 303, 80 So. 368.

Section 112, Title 14, Code of 1940, to which I will hereinafter refer, is as follows:

"§ 112. Mutilating dead bodies.—Any person who **wantonly** mutilates the dead body of any human being, shall, on conviction, be fined not more than five hundred dollars, and may also be sentenced to hard labor for the county, for not more than one year; but the provisions of this section do not apply to dissections by physicians and surgeons." (Underscoring supplied.)

The latter quoted provisions were, without material difference, included in the Codes of 1907 and 1923.

It must be observed from the above that it is not every "mutilation" that is prohibited by the statute, but the "wanton mutilation." Wanton (or wantonness) has been defined as, "A reckless or malicious and intentional disregard of the property rights and safety of others, implying, actively, a licentious or contemptuous willingness to injure and disregard of the consequences to others, and, passively, more than mere negligence, that is, a conscious and intentional disregard of duty." (Black's Law Dictionary.) I do not believe that the phrase "wantonly mutilates" is applicable to the use of cadavers you contemplate.

In addition to the above, attention is called to the heading of the "Foster Act" (Acts of 1923, page 381), which is as follows:

"AN ACT For the promotion of medical science by the distribution and use of unclaimed dead bodies for scientific study through a board created for that purpose."

Section 176, Title 22, Code of 1940, authorizes the Board, or its duly authorized officers, to assume possession of the bodies and "to take and remove such bodies to be used only within this state solely for the advancement of medical science." Science has been legally defined as, "The knowledge of many, orderly and methodically arranged, so as to become attainable to one." (Vol. 38, page 329, Words and Phrases.) It is my further opinion that courses in Anatomy and Physiology are courses in medical science and that the statute authorizes the use of cadavers therein.

I cannot subscribe to the narrow view that a course must be within the "Medical School" to advance medical science; instead, I believe that there are numerous courses available to the average as well as the medical student, such as the two mentioned by you, which "advance medical science."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 16, 1945.

Hon. F. L. Gaddis

Judge of Probate

Autauga County

Prattville, Alabama

Inferior Courts—Autauga County—Fine and Forfeiture Fund—Local Acts of 1935, p. 82—Title 12, Section 34, Code of 1940.

Under the provisions of Section 16 of Local Act No. 158, Local Acts of Alabama of 1935, p. 82, all fines and forfeitures collected in the Inferior Court of Autauga County must be paid by the clerk of said Court to the county custodian and placed in the Fine and Forfeiture Fund of Autauga County. Such funds become a part of the Fine and Forfeiture Fund of Autauga County and are subject to transfer under the provisions of Title 12, Section 34, Code of 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 25, 1945, is as follows:

"Section 16, of an Act to amend an Act, entitled an Act to establish the Inferior Court of Autauga County, Alabama in lieu of all Justices of the Peace and Notaries public Ex-Officio Justices of the Peace in Prattville, Precinct No. 1, of Autauga County, Alabama, Local Acts of Alabama of 1935, page 82, Et Seq., provides as follows:

" 'Section 16, All fines and forfeitures charged and collected in said Court shall be paid by the Clerk to the County Custodian and take a receipt therefor, who shall place all of such fines and forfeitures to the credit of the Fine and Forfeiture Fund of said County.'

"Also please refer to Section 23 of the above Act.

"Code of 1940, Title 12, Section 34, provides for transfer of Fine and Forfeiture Fund to the general fund.

"Please advise me if the Treasurer of Autauga County is authorized under the above Local Act and Section 34, of Title 12, Code of 1940, to transfer any balance on hand at the end of the fiscal year of the Fine and Forfeiture Fund in excess of the Registered claims and lawful claims, or charges against said Fund, or to the General Fund, or to any special fund to which, by resolution of the Board of Revenue, expressed in writing and spread upon the Minutes of the Court, she may be directed.

"It appears that the Fine and Forfeiture Fund of Autauga County, was in excess of all legal claims for the past fiscal year; such being the first instance since establishment of the Civil and Criminal Court of Autauga County, Alabama. Also advise if any section of the Local Act, aforesaid, is contrary to the operation of said Section 34, of Title 12, Code of 1940."

Section 16 of Local Act No. 158, Local Acts of 1935, page 82, which Section is set out in your request, requires that all fines and forfeitures charged and collected in the Inferior Court of Autauga County shall be paid by the clerk of said court to the county custodian and a receipt taken therefor, and that the county custodian shall place all such fines and forfeitures to the credit of the Fine and Forfeiture Fund of Autauga County. When such fines and forfeitures are paid to the county custodian as required by said Section 16, and credited by the custodian to the Fine and Forfeiture Fund of Autauga County, such fines and forfeitures become a part of the Fine and Forfeiture Fund of Autauga County as any other funds placed in said Fund. There is no provision in Act No. 158, supra, which would require the county custodian to segregate funds that are paid to him under the provisions of Section 16, supra, from any other funds in the Fine and Forfeiture Fund of Autauga County, and such funds are subject to transfer under the provisions of Title 12, Section 34, Code of Alabama 1940, as are any other funds in the Fine and Forfeiture Fund of Autauga County.

It is my opinion that under the provisions of said Section 34 the county treasurer of Autauga County may transfer any balance on hand in the Fine and Forfeiture Fund at the end of the fiscal year in excess of the registered and lawful claims or charges against said Fund to the General Fund of Autauga County, "or to any special fund to which by resolution" of the governing body of Autauga County "expressed in writing and spread upon the

minutes of the court, he may be directed." The fact that part of the funds in the Fine and Forfeiture Fund of Autauga County were paid to the county treasurer of Autauga County by the clerk of the Inferior Court of Autauga County has no bearing on this conclusion.

In view of the above conclusion, it is not necessary to answer that part of your request in which you inquire as to whether "any section of the Local Act, aforesaid, is contrary to the operation of said Section 34, of Title 12, Code of 1940."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 16, 1945.

Hon. Ben P. Singleton

Chief Examiner of Public Accounts and

Chief of the Division of Local Finance

Montgomery 4, Alabama

Counties—Lease-purchase Agreements—

A county is authorized to pay the costs of repairs to an automobile or to road machinery in its possession and use under a lease-purchase agreement, whereby upon payment in full of all installments of purchase money designated as rent the county will acquire legal title to such property.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 31, 1945, is as follows:

"Please provide me with your formal opinion in answer to the following:

"Can the cost of repairs to an automobile or a piece of road machinery, bought on a lease-purchase agreement in which the title is still vested in the vendor be paid for by a County Board of Revenue?

"In connection with this matter, I respectfully refer you to the opinion of your office on page 88 of Volume 31."

In connection with your request I have examined a specimen form of lease-purchase agreement between J. D. Pittman Tractor Company, Inc., and Tallapoosa County, which from your letter of February 13, I understand to be the type of lease-purchase agreement referred to in your request for this opinion.

Paragraph numbered (5) of this document reads as follows:

> "Lessee agrees to take reasonable and proper care of the said property and to make at its expense all necessary repairs and replacements thereof. So long as lessee shall not be in default under this lease it shall have the right to make reasonable and lawful use of said property."

The legal effect of such agreements is to make the so-called lessee benefical owner of the leased property to the same extent and effect as if the property had been sold and delivered to lessee and the vendor had taken a chattel mortgage thereon for the unpaid balance of purchase money, or had sold the property under a conditional sale contract.

In other words, although legal title is still vested in the vendor yet the county is the owner of the beneficial interest in the property, is in possession thereof, and holds the same with the expectation ultimately of acquiring legal title thereto. **State v. White Furniture Company, 206 Ala. 575, 90 So. 896.**

Aside from this as will above appear, the county or purchaser has expressly agreed to make all necessary repairs on the property and that covenant is a part of the purchase agreement and should be observed. It will be also observed that the cost of repairs to an automobile or road machinery in the possession of the lessee or vendee is necessarily a part of the operating expense incurred in the operation of such automobile or machinery. I am of opinion, therefore, that a county is authorized to pay the costs of such repairs.

The opinion of this office to which you refer in Quarterly Report of Attorney General, Volume XXXI, page 88, holds merely that the county was unauthorized to repair an automobile owned by some other person and used by him only partially in the pursuit of his duties as a county employee. That opinion has no bearing upon the present question, yet at the same time it is entirely sound and is reaffirmed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 16, 1945.

Hon. C. H. Keller

Register, Circuit Court

Cullman County

Cullman, Alabama

Registers—Commissions—Title 11, Section 27, Code of Alabama 1940—

The register is entitled to "Commissions on sales" as provided in Title 11, Section 27, Code of 1940, whether the decree of the court ordering the sale of property requires the register to sell the same at public sale to the highest bidder for cash or at public sale

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 31, 1945, is as follows:

"I would appreciate you advising me your opinion on the following question:

"What commission would I be entitled to as Register of the Circuit Court, in Equity of this county in a case of this nature? A suit is filed for sale and division among tenants in common or joint owners for division of the proceeds of the sale of real estate and in the final decree the court orders that the undersigned as Register sell the real estate described in the original bill at **private sale** to the highest bidder for cash, instead of ordering the property sold at **public sale.** Would I be entitled to commission on the sale as set out in the first sentence under the heading 'Commission on sales', Title 11, Section 27, Page 273 of the 1940 Code of Alabama which reads as follows:

" 'For the first one hundred dollars, two per cent; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half per cent; for all over one thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent.'

"Or, would I be entitled to the fees set out in the second sentence of the above mentioned section which reads as follows:

" 'For receiving, keeping, and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one per-cent; etc.'

"I would appreciate your opinion as soon as possible."

In answer to your inquiry, it is my opinion that you are entitled to a commission on the sale of the property involved in the case set out in your request. The fact that the judge in the decree ordered you to sell the property "at **private sale** to the highest bidder for cash, instead of ordering the property sold at **public sale**" is not material in answering your inquiry. The statute under consideration does not base your right to "Commission on sales" on the manner in which the property is sold. The property was sold by you as register under an order of the court, and you are entitled to a commission on the sale of the same.

The fee for "receiving, keeping and paying out or distributing money" by the express provision of the statute has application to money "other than that arising from sales."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 20, 1945.

Miss Addie Lee Farish, Director

Department of Commerce

Montgomery 4, Alabama

Hon. Brooks Glass, Acting Superintendent of Insurance

Board of Insurance

Montgomery, Alabama

Department of Commerce — Insurance — Foreign Corporations — Premium Tax — Title 28, Section 46, Section 79, Section 82, Section 85; Title 51, Section 815, Section 816, Section 890 and 891, as amended; Title 55, Section 28, Code of Alabama 1940—General Acts of 1943, page 369.

1. The superintendent of insurance is without authority to renew a foreign insurance company's certificate of authority to do business in this State, in the event such insurance company fails or refuses to pay the premium tax levied under the provisions of Title 51, Section 816, Code of 1940.

2. The superintendent of insurance is authorized to cancel or refuse to renew the certificate of authority of an agent of a foreign insurance company where such company has not secured the necessary certificate of authority authorizing it to do business in Alabama.

3. When the taxes levied under the provisions of Title 51, Section 816, are paid under protest, with or without notice that the insurance company expects to hold the superintendent of insurance personally liable should it be determined that any or all of the tax was not due, such taxes should be paid into the State Treasury as provided in Title 51, Section 891, Code of 1940.

4. When such taxes are paid without protest, they should be remitted to the State Treasury as provided in Title 55, Section 28, Code of 1940.

5. The superintendent of insurance is without authority to accept a tender of an amount less than the amount levied upon a foreign insurance company under the provisions of Title 51, Section 816, Code of 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Miss Farish and Mr. Glass:

Your request for an official opinion, bearing date of January 8, 1945, is as follows:

"The recent decision of the United States Supreme Court in the South Eastern Underwriters case declares that insurance is interstate commerce and over rules a long line of decisions in which the Supreme Court held that insurance was not commerce. The Chief Justice in his dissenting opinion said that 'certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce.'

"Under Article 12 of Title 51 of the Code of Alabama of 1940 premium taxes are assessed against domestic companies at a lower rate than foreign companies; and I am informed that a larger number of foreign companies will either refuse to pay premium taxes under this Article or will pay them under protest and sue for recovery, presumably under Section 890 of Title 51, Code of Alabama, 1940. It is said that the companies have no other alternative without running the risk of stockholder suits against the directors for making payments of illegal exactions by the several states. Unless there is a complete reversal of thinking on the subject as indicated by the trade journals it will be necessary to thoroughly examine our procedure lest our large revenues from premium taxes be put in jeopardy. I therefore ask your opinion upon the following questions:

'1. If a foreign insurance company fails or refuses to pay its premium tax on or before March 1, should we refuse to renew such company's certificate of authority for doing business in Alabama, and cancel or refuse to renew the certificate of authority of its agents and representatives?

"2. If your answer to the above is in the affirmative, and such company continues to operate in this State after cancellation of said certificate of authority, should we proceed against the company's agents and representatives as provided by law relative to persons representing unauthorized insurance companies?

"3. If such taxes are paid to the Superintendent of Insurance under protest, with notice that the company expects to hold the Superintendent of Insurance personally liable should it be determined that any or all of the tax was not due, what disposition should be made of such collections?

"4. If such taxes are paid to the Superintendent of Insurance under protest, but with no notice of personal liability involved, should such collections be remitted to the State Treasurer as has been done in the past, and if not, what disposition should be made of such collections?

"5. If such taxes are paid to the Superintendent of Insurance without protest, should he, knowing that there is a doubt as to the validity of our premium tax statutes, remit such collections to the State Treasurer, and if not, what disposition should be made of such collections?

"6. If tender is made of taxes by a foreign corporation in an amount that would be due by such foreign corporation if it were a resident corporation, can the superintendent of insurance refuse certificate of authority for doing business in Alabama, and cancel or refuse to renew certificate of authority of its agents and representatives.

"Your early consideration of the above questions and your opinion thereon will be greatly appreciated."

It is my opinion that the three questions presented by your first inquiry must be answered in the affirmative.

The powers and duties of the superintendent of insurance are set out in Title 28, Section 46, Code of 1940, which Section is as follows:

"§ 46. Powers, duties and jurisdiction of bureau of insurance and superintendent of insurance—The superintendent of insurance shall possess and have all the powers, and perform all the duties of supervision, regulation, and control of the business of insurance in this state. And the superintendent of insurance shall exercise the same control over the insurance companies or associations, mutual aid companies, fraternal societies, inter-insurance exchanges, their officers, agents and representatives, **and shall collect from them all taxes,** fees, and penalties as are required by law. The superintendent of insurance shall have the management and supervision of the bureau of insurance, and shall be charged with the performance of all acts necessary to the carrying out and effectuating the purposes and ends for which said bureau was created. And the superintendent of insurance is hereby authorized and empowered, from and after the date of his appointment and qualification as such superintendent of insurance, to perform all duties now required by law, in relation to the supervision, regulation, and control of the business of insurance in this state." (Emphasis added.)

Your attention is called to Title 51, Chapter 20, Article 12, Section 815, Code of 1940, which Section is as follows:

"§ 815. Statement required to be filed.—Every insurance company desiring to engage in business in this state, in addition to complying with the requirements of this article, shall within the first sixty days of the

calendar year, file with the superintendent of insurance a statement which shall show that the insurance company has complied with all the requirements of the law to authorize it to do business in this state, and shall also show the total amount of premiums received by it for business done in this state for the preceding calendar year ending December thirty-first, less return premiums. Such statement shall be verified by the affidavit of an officer of the company having knowledge of the facts, **and such company shall at the same time pay to the superintendent of insurance the amounts set out in this article."** (Emphasis added.)

The tax under consideration is levied under the provisions of Title 51, Chapter 20, Article 12, Section 816, Code of 1940.

It will be seen from Section 815, supra, that insurance companies desiring to engage in business in this State must, within the first sixty days of the calendar year, file with the superintendent of insurance a certificate showing that it has complied with all requirements of law to do business in this State, and must also show the total amount of premiums received by it for business done in this State for the preceding calendar year, less return premiums. It will also be seen from said Section that at the same time the insurance company must pay the amount of tax levied under the provisions of Section 816, supra.

In the event an insurance company does not comply with the provisions of Sections 815 and 816, supra, the superintendent of insurance would be without authority to renew the company's certificate of authority to do business in Alabama.

Title 28, Section 79, Code of 1940, defines who is an insurance agent. This Section provides as follows:

"§ 79. Who is an insurance agent.—Any person who solicits insurance on behalf of any insurance company or for the agent of an insurance company, or takes or transmits any application for insurance, or any policy of insurance, to or from any insurance company, or in any way gives notice that he will receive or transmit the same or receives or delivers a policy of insurance for any company, or examines or inspects a risk or receives, collects, or transmits any premium of insurance or makes or forwards any diagram of any building or buildings (except as a bona fide draughtsman), or countersigns any policy of insurance, or does or performs any other act or thing in the making or consummating of any contract of insurance with or for any insurance company, or examines or adjusts, or aids in adjusting any loss for or on behalf of any insurance company whether any such acts shall be done at the request or instance or by the employment of any insurance company, or if by any other person (except those acting as attorneys at law) is deemed an insurance agent. No person shall perform any of the acts set out above as an agent for any insurance company until such company shall have complied with the laws of the state and received the proper license or certificate of authority from the superintendent of insurance authorizing it to do business in this state."

It will be seen from the above Section that no person shall act as an insurance agent of any insurance company which has not complied with the

laws of the State and received the proper authority from the superintendent of insurance authorizing it to do business in this State.

The provisions for the revocation of an insurance agent's license are set out in Title 28, Section 82, Code of 1940. It will be seen from Section 82 that the superintendent of insurance "may revoke any agent's license or suspend any agent's license or refuse to renew any agent's license which may be then expired," if after investigation and hearing it is established that such agent has violated any provision of the insurance laws of this State or any laws in the course of his dealings as agent.

In the case under consideration, if the superintendent of insurance refuses to renew a company's certificate of authority to do business in this State, an agent who performed any acts as set out in Section 79, supra, would be guilty of a violation of the insurance laws of this State, and for this reason the superintendent of insurance would be authorized under Section 82, supra, to cancel or refuse to renew the license of such agent.

It is my opinion that your second inquiry must also be answered in the affirmative.

In this connection, I wish to call your attention to Title 28, Section 85, Code of 1940, which is as follows:

> "§ 85. Penalty for violation of article.—Any person who shall violate any provision of this article shall be fined not more than five hundred dollars."

Therefore, if an agent of an insurance company, which company has not complied with the laws of this State and received the proper certificate of authority from the superintendent of insurance authorizing it to do business in this State, continues to act as agent for such company, such agent would be subject to the penalty provided in Section 85, supra.

In view of the above conclusions, I wish to discuss the duty of an officer to obey the law, and the authority of an officer to question the constitutionality of a statute which imposes a duty upon him. And while the constitutionality of the statute levying the tax under consideration is not being construed in this opinion, I also wish to discuss the protection afforded an officer when performing a duty under an unconstitutional statute before such statute has been declared unconstitutional by a court of competent jurisdiction.

"It is the duty of an officer to obey the general laws and the laws which prescribe the duties of his office. The Supreme Court of the United States has repeatedly asserted that all the officers of the government from the highest to the lowest are creatures of the law and bound to obey it." 43 Am. Jur., Public Officers, 262.

In the case of **State of Florida, ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers,** 84 Fla. 592, 94 So. 681, 30 A. L. R. 362, the court held that the "right to declare an act unconstitutional is a purely judicial power,

and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution." This case contained the following quotation from the case of **People ex rel. Atty. Gen. v. Salomon,** 54 Ill. 39:

> "In Illinois the first attempt by a ministerial officer to exercise the judicial function of declaring a law unconstitutional met with prompt disapproval in the supreme court of that state. The court said:
>
> " 'The law under which this additional tax was imposed had passed the legislature under all the forms of the Constitution, and had received executive sanction, and became, by its own intrinsic force, the law to you, to every other public officer in the state, and to all the people. You assumed the responsibility of declaring the law unconstitutional, and at once determined to disregard it, to set up your own judgment as superior to the expressed will of the legislature—asserting, in fact, an entire independence thereof. This is the first case in our judicial history in which a ministerial officer has taken upon himself the responsibility of nullifying an act of the legislature for the better collection of the public revenue, of arresting its operation,—of disobeying its behests, and placing his own judgment above legislative authority expressed in the form of law.
>
> " 'To the law every man owes homage—"the very least as needing its care, the greatest as not exempted from its power." To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government, for, if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection to the laws.' "

"Public policy and public necessity require prompt and efficient action from ministerial offices, and when intrusted with the assessment of taxes, the collection and disbursement of revenue, they have no right to refuse to perform ministerial duties prescribed by law because of any apprehension on their part that others may be injuriously affected or that the statute is unconstitutional, for the individuals who might be injuriously affected may not doubt the constitutionality of the law, or may waive their rights, or in person choose to test the validity of the enactment." 30 A. L. R. 398. Citing **Ames v. People,** 26 Colo. 83, 56 Pac. 656. See also **Prescott v. City of Memphis,** 285 S. W. 587, 48 A. L. R. 1378; **Wendt v. Berry,** 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N.S.) 1101; **Smith v. Titcomb,** 31 Me. 272; **State ex rel. Chicago, R. I. & P. Ry. Co. v. Becker,** 41 S. W. (2d) 188.

"According to one line of authorities, the rule that ignorance of the law excuses no one is of such force that even those who rely on a law which appears to be valid but is in fact unconstitutional are liable for acts which for justification depend on such law. According to this view a public officer who executes process issued under an unconstitutional statute is, since he acts without authority, a trespasser and liable as such to persons injured thereby. But according to another and more approved view of the law, an unconstitutional statute until it has been declared unconstitutional may protect an officer acting under it and give him at least the standing of a de facto officer. * * * * * * * And it is held that an officer who sells property for taxes, acting under a void statute, is not liable to a purchaser of the property, since

the purchaser has the same opportunity of knowing whether the sale is valid or void that the officer making the sale has." 43 Am. Jur., Public Officers, Section 284.

The following statement is found in the case of **Wendt v. Perry,** 154 Ky. 586, 157 S. W. 1115:

> "(3) Acts of the Legislature are presumed to be valid until declared void by the courts. The people generally and rightfully so regard them. The power and authority of public officers who exercise the duties of office under legislative enactments is recognized by all persons with whom they have dealings in their official capacity, and the public good imperatively demands that validity should be given to the acts of these officers when they are performing duties within the scope of their public authority. If individuals dealing with public officers might in every instance question their authority or deny their right to exercise the office until the courts of last resort had given the sanction of their approval to the validity of the legislation under which the office was established, the conduct of public affairs would be involved in interminable confusion and doubt. No person would feel secure either in his personal or his private rights. Confusion and uncertainty would attend every official act that was performed. Such a condition as this would be disastrous to the peace and welfare of society. It would encourage the lawless to persist in their offenses and make difficult the just enforcement of the law, as persons charged with this duty and willing to exercise it would always be apprehensive of their right to do so.
>
> "(4) Therefore, as the precise question here involved is a new one in this state, we feel at liberty to announce the rule, sound in principle, and supported by abundant authority, that the acts of public officers, whether they be state, county, district or municipal, created by an act of the Legislature, are valid as to the public and all persons having dealings with the officers antecedent to the time when the legislative act under which they were exercising authority was declared unconstitutional."

In the case of **Cudahy Packing Co. v. Harrison,** 18 Fed. Supp. 250, it was held that the rule that an unconstitutional law is no law cannot be applied to work a hardship upon a public officer who in the performance of his duty acted in good faith in reliance upon the validity of a statute and before any court had found that the statute was invalid.

In the case of **Anniston Manufacturing Co. v. Davis,** 87 Fed. (2d) 773, affirming D. C., **Lincoln Mills of Alabama v. Davis,** 15 Fed. Supp. 257, certiorari granted **Anniston Manufacturing Co. v. Davis,** 57 S. Ct. 493, 300 U. S. 649, 81 L. Ed. 861, afirmed 57 S. Ct. 816, 301 U. S. 337, 81 L. Ed. 1143, rehearing denied 58 S. Ct. 3, 302 U. S. 772, 82 L. Ed. 599, rehearing denied C. C. C. A., **Lincoln Mills of Alabama v. Davis,** 89 Fed. 210, 212, the court made the following statement:

> "But say the appellants, our right of action springs from the fact our action asserts, that the purported law under which appellee proceeded was unconstitutional. It was therefore no law, and appellee was a trespasser ab initio, without legal protection or authority. In support of their general proposition that an unconstitutional law is no law, they quote from Norton

v. Shelby County, 118 U. S. 425, at page 442, 6 S. Ct. 1121, 1125 30 L. Ed. 178: 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'

"But, like every other like phrase coined arguendo in the process of decision, this phrase leaves something to be desired, when it is lifted from its argumentative setting to be converted into a general legal canon on, indeed, into almost a part of, the Constitution itself. When it is attempted, as here, to be given such wide application as not merely to strike down an exaction so that it cannot thereafter be collected, but to support a common-law acting against a collector for moneys collected and paid into the Treasury by him under color of the law, and as a part of his official duties before the law was declared unconstitutional, it is well to call attention to exactly what was decided in that case, and to the fact that there is abundant authority to the contrary of the position appellants take.

"In Norton's Case the unconstitutionality went to the existence of the office itself. All that was actually decided there was 'there can be no incumbent de facto of an office if there be no office to fill.' United States v. Royer, 268 U. S. 394, 397, 45 S. Ct. 519, 520, 69 L. Ed. 1011. Here the collector's office is not in question. The decision in United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, that the Agricultural Adjustment Act was unconstitutional, did indeed, as declared in Rickert Rice Mills v. Fontenot, 297 U. S. 110, 56 S. Ct. 374, 80 L. Ed. 513, place collectors who should thereafter attempt to collect the tax in the position of trespassers. That decision did not, nor did that in the Rickert Case, declare that, as to the collections made in the course of their official duties under that act before its unconstitutionality was declared, collectors would be liable other than as provided by statute. It may be that, if a congressional act is on its face so arbitrary and unreasonable, so beyond power, and so violative of natural rights, as that any reasonable person must know its invalidity, persons acting under it before its unconstitutionality has been declared will not be protected from a personal accounting. When, however, as in this case, the unconstitutionality of the law was far from plain, no common-law action will be raised, we think, against collectors who, before its unconstitutionality has been searched out and declared, have, by virtue of their office, collected money and paid it over. Wendt v. Perry, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101, Ann. Cas. 1915C, 493; State v. Poulin, 105 Me. 224, 74 A. 119, 24 L. R. A. (N. S.) 408, and note, 134 Am. St. Rep. 543; Lang v. Bayonne, 74 N. J. Law, 455, 68 A. 90, 15 L. R. A. (N. S.) 93, and note, 122 Am. St. Rep. 391, 12 Ann. Cas. 961; Cooley, Constitutional Limitations (8th Ed.) Vol. 1, p. 382, and note; Field, The Effect of an Unconstitutional Statute, Introduction, pp. 3 to 13, Inclusive, pp. 251, 252."

(While this opinion does not deal with the constitutionality of the tax levied on foreign insurance companies under the provisions of Title 51, Section 816, Code of 1940, there is grave doubt in my mind that this statute would be declared unconstitutional, even though the case of **United States v. South-Eastern Underwriters Association,** 88 L. Ed. (Pamphlet No. 16) 1082, held that fire insurance transactions which stretch across state lines constitute interstate commerce so as to make them subject to regulation by Congress under the commerce clause. It should be noted that in the opinion in this case,

the Court made the following statement: "And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting congressional action, the state regulatory and tax laws should be declared valid.")

In answer to your third and fourth inquiries, I wish to call your attention to the provisions of Title 51, Sections 890 and 891, Code of Alabama 1940, as amended by Act No. 402, General Acts of Alabama 1943, page 369, which are as follows:

"§ 890. Remedies of taxpayer.—Whenever any taxpayer claims that any tax, except ad valorem taxes, levied under the provisions of this law, as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. The taxpayer shall commence suit against the officer for the recovery of such excessive or invalid tax, as the case may be, within sixty days after the payment thereof under protest, and unless such suit is commenced within that period of time, for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If suit is filed for the recovery of any taxes paid under protest, within the specified period of time, and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in the succeeding section."

"§ 891. Disposition of taxes paid under protest.—Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected, or the taxpayer abandons the recovery of the money by failure to bring suit within the period of sixty days after the payment thereof. The treasurer shall give notice to the comptroller that such funds are set up in a suspense account and are therefore not available for allotment, allocation, or disbursement until the validity of the assessment and collection is determined by the court. If it is determined by the court, on suit brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the comptroller shall issue his warrant upon the treasurer for a refund of such sum as may have been determined by the court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law."

Answering your third inquiry, if the taxes under consideration are paid to the superintendent of insurance under protest with notice that the company expects to hold the superintendent of insurance personally liable should it be determined that any or all of the tax was not due, such taxes should be paid to the treasurer as provided by Section 891, as amended. The fact that the company notifies the superintendent of insurance when the taxes are paid under protest that it expects to hold the superintendent of insurance per-

sonally liable should it be determined that any or all of the tax is not due, is immaterial. Such notice could not impose any personal liability upon the superintendent of insurance.

In answer to your fourth inquiry, I wish to advise you that if such taxes are paid to the superintendent of insurance under protest but with no notice of personal liability as set out in your third inquiry, such taxes should be remitted to the state treasurer as provided by Section 891, as amended.

In answer to your fifth inquiry, I wish to advise you that if such taxes are paid to the superintendent of insurance without protest, they should be paid into the state treasury as provided by Title 55, Section 28, Code of Alabama 1940. In view of the authorities cited in my answer to your first and second inquiries, the question of the validity of the statute imposing the tax under consideration is not material in answering your fifth inquiry.

The answer to your sixth inquiry must be in the affirmative. The tax levied under the provisions of Title 51, Section 816, Code of 1940, must be paid by a foreign insurance company before you would be authorized to issue such insurance company a certificate of authority for doing business in this State. If a foreign insurance company fails to obtain such certificate, you would be authorized to cancel or refuse to renew certificates of authority of its agents and representatives. Your duties in connection with the collection of this tax are purely ministerial, and under no circumstances would you be authorized to accept a less amount than is levied by Section 816.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 20, 1945.

Hon. J. S. Freeman, Chairman

Walker County Board of Revenue

Jasper, Alabama

Code 1940, Tit. 23, § 47—Counties—General Fund—Transfers to Road and Bridge Fund—

1. County may transfer money from general fund to road and bridge fund, provided there is sufficient money left in general fund, after such transfer, to pay all prior obligations to which the general fund is subject at the time of transfer, including obligations for expenses of government for the current year.

2. Whether or not there is such surplus in the general fund is a question of fact to be determined by correct accounting.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1945, is as follows:

"On September 15, 1944, the Board of Revenue of Walker County transferred from the general fund $25,000.00 to a 'Cash Emergency Reserve Fund' with no provision as to its specific application. On behalf of the Board of Revenue, I am requesting an opinion from you as to whether the Board can now transfer that $25,000.00 from the Cash Emergency Reserve Fund to the Gasoline Fund to be used for the purpose of road machinery and equipment and maintenance of roads and bridges.

"Extra heavy hauling of coal and lumber has gotten the roads of Walker County in bad condition and this makes it important that we have your opinion at your early convenience."

This office holds that under Code 1940, Title 23, Section 47 (General Acts 1927, pages 348, 392, Section 161) a county governing body may transfer moneys from the general fund to the road and bridge fund, provided there is at the time of transfer a surplus in the general fund. Opinion of the Attorney Dale County, September 21, 1939, Quarterly Reports, Volume 16, page 262.

General to Treasurer of Walker County, January 18, 1940, Quarterly Report, Volume 18, page 71; Opinion of the Attorney General to Judge of Probate of

Whether or not there is such surplus is a matter of accounting and a matter of fact to be determined by some qualified expert accountant as to which, however, the following rule has been laid down in **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850, to-wit:

"While Act September 22, 1915, (Laws 1915, page 573) authorizes the transfer of any surplus of the general fund to road fund, a transfer of a portion of the general fund to the road fund cannot be justified under that act where the county was much indebted, and there were warrants having priority unpaid".

With reference to this test in the opinion to Judge of Probate of Dale County of September 21, 1939, supra, this office said:

"The above simply means that you cannot make such a transfer from the general fund to the road and bridge fund of your county where by so doing you are likely to impair the general fund to such an extent that warrants having priority could not be paid. In other words there cannot be said to be a surplus in the general fund until all preferred claims against the county, and all appropriations which the law makes mandatory **have been paid,** or adequate funds are on hand sufficient to meet all preferred claims. After this has been done, if a surplus remains, the court of county commissioners may lawfully transfer any such surplus to the road fund to be used as provided by law. See Bennial Report of Attorney General, 1930-32, p. 446, **Ramage Park & Co. v. Folmar,** 214 Ala. 661, 108 So. 580."

To the same effect is the opinion of this office to Treasurer, Colbert County, July 18, 1940, Quarterly Reports, Volume 20, page 85.

I find no authority of law whereby a county governing body may create a special fund to be known as "Cash Emergency Reserve Fund," without specific provision as to its application. Such fund when attempted to be created is in fact nothing more nor less than a part of the general fund masquerading under a fancy name and should in my opinion be regarded simply as a part of the general fund, and as such subject to the provisions of law which are above set forth.

Upon that premise I am of opinion that the twenty-five thousand dollar fund above referred to as having been created on September 15, 1944, may be transferred to the county's road and bridge fund, provided when such transfer is made there remains in the general fund sufficient money to pay all county obligations as to which there exists a priority of obligation.

In other words unless the general fund, including the twenty-five thousand dollars aforementioned, is sufficient to afford a surplus, as above defined, to the extent of twenty-five thousand dollars or more, transfer of twenty-five thousand dollars to the road and bridge fund would be unauthorized and an illegal diversion of public funds.

This opinion is based upon the assumption that the transfer on September 15, 1944, of twenty-five thousand dollars from the general fund to the so-called "Cash Emergency Reserve Fund" did not change the character of the funds so transferred and that they continued to be in legal effect general funds.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 21, 1945.

Hon. H. G. Dowling

Commissioner of Revenue

Department of Revenue

Montgomery, Alabama

Taxation—Sales tax—Use tax—State Department of Revenue—Rules and Regulations—Title 51, Section 781, as amended, Section 753, Section 788, Code of 1940.

A licensed retail dealer who purchases tangible personal property at wholesale, presumably for resale, is not liable for sales tax or use tax on that part of such property that is personally used or consumed by him. The State Department of Revenue is without authority by

rule or regulation to "prevent licensed retail dealers from diverting tangible personal property purchased for resale, to their own use or consumption, without reporting and paying the taxes thereon."

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of January 8, 1945, is as follows:

"1. Section 753, Title 51, Code of Alabama 1940, contains the following provision, I quote:

" 'There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged, or continuing within this state, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidence of debt or stocks), an amount equal to two percent of the gross proceeds of sales of the business except where a different amount is expressly provided herein.'

"2. Section 788, Title 51, Code of Alabama 1940, contains the following provision, I quote:

" '(a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail on or after the first of March, 1939, for storage, use or other consumption in this state at the rate of two percent of the sales price of such property, except as provided in subsection (b) of this section'.

"3. It comes to the attention of the State Department of Revenue that a large number of retail dealers are purchasing tangible personal property at wholesale and subsequently diverting portions thereof to their own use and consumption without paying any sales or use taxes thereon.

"4. You will observe that the use tax provision of the statute is limited to tangible personal property purchased at retail. The purchases under consideration are not retail purchases but wholesale purchases. If this provision of the statute is construed most favorably to the taxpayer, he could not be charged a use tax on the tangible personal property consumed by him.

"5. You will further observe that the property is purchased at wholesale, by a licensed retail dealer, presumptively for the purpose of resale. However, he diverts a portion of the merchandise to his own use and thereafter fails to report or remit the taxes. Such dealer is therefore defeating the legislative intent of the levy of a universal sales or use tax of 2%.

"6. The State Department of Revenue has drafted a resolution, the object and purpose of which is to make the diversion of such property from the regular sales channel taxable under the provisions of the Sales Tax Statute. A copy of the purpose regulation is attached.

"7. The State Department of Revenue is authorized under the provisions of Section 781, Title 51, Code of Alabama 1940, as amended by Act No. 545, found on page 534 of the General Acts of Alabama, Regular Session 1943, to promulgate rules and regulations for making returns and ascertaining the amount of taxes due under the provisions of the Sales Tax Statute.

"The State Department of Revenue will greatly appreciate it, if you will, in view of the foregoing, furnish the Department with a legal opinion in answer to the following identified question.

"(a) Is the State Department of Revenue Authorized to promulgate and enforce the provisions of the suggested sales tax resolution attached?

"(b) If your answer to the above identified inquiry is in the negative, is the State Department of Revenue authorized under the provisions of the Use Tax Statute to collect a use tax upon merchandise purchased and diverted as hereinabove suggested?

"(c) If your answer to the last identified question is in the negative, how may the State Department of Revenue prevent licensed retail dealers from diverting tangible personal property purchased for resale, to their own use and consumption, without reporting and paying the taxes thereon?

"An early answer to the above identified questions will be greatly appreciated."

As the sales tax regulation under consideration is not contained in the body of your request, I deem it advisable to set out the same here.

"SALES TAX REGULATION NO. 20.

"Where a licensed retail dealer in Alabama purchases tangible personal property for resale but diverts a portion thereof to his own personal use or consumption, without resale, such use or consumption may be determined, at the option of the State Department of Revenue, to be a sale of such property at the regular retail price thereof and such dealer may be required to report such diversion on forms furnished by the State Department of Revenue, as all other retail sales are reported, and to pay the taxes thereon in the same manner as if such property had been sold at retail."

While it is true that under the provisions of Title 51, Section 781, Code of 1940, as amended, the State Department of Revenue may "promulgate such rules and regulations for making returns and for the ascertainment, assessment and collection," of the sales tax, it cannot promulgate a rule or regulation to effect the collection of sales tax from a retail dealer when such dealer is not liable for the tax under the terms of the Sales Tax Act. Therefore,

the question to be determined in answer to your first inquiry is whether or not a licensed retail dealer in Alabama who purchases tangible personal property presumably for resale, and who personally uses or consumes part of such property is liable for sales tax on that part of the property so used or consumed by such retail dealer.

It is my opinion that a retail dealer is not liable for sales tax on that part of the tangible personal property purchased by him at wholesale, presumably for resale, which is personally used or consumed by him.

It will be seen from that portion of Title 51, Section 753, Code of Alabama 1940, set out in your request, that the sales tax is "a privilege or license tax" levied "against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales or gross receipts as the case may be." In the instant case, the rate of the tax is "an amount equal to two percent of the gross proceeds of sales of the business except where a different amount is expressly provided herein."

In the case of **Doby, et al v. State Tax Commission,** 234 Ala. 150, 174 So. 233, in which the Court had under consideration the Sales Tax Act, the Court said: "In considering the coverage of such statutes, as other tax laws, the rule of strict construction prevails. No strained construction is to be indulged against the taxpayer because of a purpose to raise needed revenue." As the measure of the tax is based upon the gross proceeds of sale of the licensed retail dealer under consideration, the question then presents itself as to whether or not the personal use or consumption by a licensed retail dealer of a part of the tangible personal property purchased by him at wholesale and presumably for resale is in fact a sale of such property, and for this reason should be included the gross proceeds of sale of the business, and, therefore, subject to the sales tax.

"The work 'sale' has a well-defined legal signification and in the absence of anything to the contrary it will be assumed that the work is intended to have its usual signification. Tipsword v. Doss, 273 Ill. App. 1." Words and Phrases, Per. Ed., Volume 38, page 58.

"A 'sale' in legal nomenclature, is a term of precise legal import * * * * and has a well-defined legal signification, and has been said to mean, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay the seller for the thing bought or sold. In re Franks' Estate, 277 N. Y. S. 573, 154 Misc. 472." Words and Phrases, Per. Ed., Volume 38, page 60.

"A 'sale' in the legal import of the word, implies a transferring of property from the seller to the buyer for a price, and includes, not only the idea of devesting the seller of title, but that of vesting it in the buyer. In this sense the sale can be only to the party who, on the sale and by reason of it, becomes the owner of the thing sold. State v. Wentworth, 35 N. H. 442, 443." Words and Phrases, Per. Ed., Volume 38, page 64.

In view of the definition of the term "sale" set out above, it is my opinion that the personal use or consumption by a licensed retail dealer of part of the tangible personal property purchased by him at wholesale, presumably for resale, is not a sale of such tangible personal property within the meaning of

the sales tax statutes, and for this reason is not a part of the "gross proceeds of sales" of such licensed retail dealer and is not subject to sales tax.

The premises considered, it is my opinion that the State Department of Revenue is without authority to promulgate and enforce the provisions of the sales tax regulation under consideration.

Under the provisions of Title 51, Section 788, Code of 1940, the use tax is "imposed on the storage, use or other consumption in this state of tangible personal property **purcahsed at retail** on or after the first of March 1939, for storage, use or other consumption in this state at the rate of two percent of the sales price of such property," except as otherwise provided in said Section.

Since the question under consideration in your second inquiry has reference only to tangible personal property purchased at wholesale by a licensed retail dealer, presumably for the purpose of resale (paragraphs 4 and 5 of your request), it is my opinion that a licensed retail dealer is clearly not subject to use tax on tangible personal property purchased by him at wholesale, presumably for resale, and personally used or consumed by him.

In answer to your third inquiry, it is my opinion that there is no way in which the State Department of Revenue may "prevent licensed retail dealers from diverting tangible personal property purchased for resale to their own use and consumption without reporting and paying the taxes thereon." This is a matter that addresses itself to legislative action.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 23, 1945.

Hon. Ben P. Singleton

Chief Examiner of Public Accounts

Department of Finance

Montgomery 4, Alabama

Costs and Fees—County Courts—Lawrence County—Solicitor's fees—"County Court Fees"—Constitutionality—Local Acts 1919, p. 86—General and Local Acts of 1920, Special Session, p. 171—Constitution of 1901, Section 96, Section 104 (25)—Title 11, Section 87, Code of 1940.

1. Section 10 of Act No. 249, Local Acts of 1919, p. 88, and Act No. 22, General and Local Acts of 1940, Special Session, p. 171, amending said Section 10, is unconstitutional insofar as it provides that in cases where a plea of guilty is interposed by the defendant no solicitor's fee shall be taxed or collected in excess of the amount of the fine assessed.

2. Section 12 of Act No. 249, Local Acts of 1919, p. 89, which provides that "in all cases of conviction, plea of guilty or a judgment final on a forfeited bond, there shall be taxed against the defendant

or defendants, a fee of $3.00, called the 'County Court Fee' * * *" is unconstitutional in that it violates Section 96 of the Constitution of 1901. However, said unconstitutional provision does not render the remaining part of Section 12 unconstitutional.

3. The fee for trial and entering judgment provided in Title 11, Section 87, Code of 1940, is a proper charge in the County Court of Lawrence County.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion ,bearing date of October 9, 1944, is as follows:

"Please refer to the opinion of the Supreme Court rendered on June 27, 1940, found on page 76, Volume 240, Alabama Reports (So. 197, page 365), Case of England vs State and advise whether or not the questions raised in said case would, in any manner, have the effect as approving as legal certain fees as authorized in Local Act No. 249 (Local Acts, 1919, page 86), approved August 29, 1919, as amended by Local Act No. 22, (Local Acts, Special Session, 1920, page 171), approved September 29, 1920, as set out below:

"1. That in all cases where a plea of guilty is interposed by the defendant, no solicitor fees shall be taxed or collected in excess of the amount of the fine assessed, which is contrary to the general law in respect to solicitor fees as provided under Section 85, Title 11, 1940 Code, and which may, also, do violence to Section 96 of the 1901 Constitution. (See Section 10 of the Act.)

"2. That in all cases of conviction, plea of guilty, or a judgment final on a forfeited bond, there shall be taxed against the defendant or defendants, a fee of $3.00 called the 'County Court Fee' to be paid over to the County Treasurer when collected, as provided in Section 12 of said Local Act, which is contrary to the general law as provided under Section 87, of Title 11, 1940 Code, imposing a $5.00 Trial Fee to be paid over to the County Treasurer when collected, and which may, likewise do violence to Section 96 of the 1901 Constitution.

"By reference to this Supreme Court opinion, it will be noted that the Court restricted its opinion to the questions raised in the case, and, I do not believe these questions were raised.

"For your information, I wish to advise that the County Court Clerk of Lawrence County is not following the provisions of Section 10 of the 1919 Local Act, as amended, but he is following the provisions of Section 85, of Title 11, 1940 Code in that he is charging the proper solicitor fee according to the nature of the offense.

"However, in respect to Item No. 2, he is crossed up with the provisions of said Local Act and the General Law, in that when the defendant is

convicted or pleads guilty and pays off in cash, he is charged with the $3.00 so called 'County Court Fee', as per Section 12 of said Local Act, but when a defendant is convicted and/or or pleads guilty and is unable to pay off, and does not enter into a 'Confession of Judgment', and has to be sentenced to hard labor to pay fine and costs, instead of being charged with the $3.00 so called 'County Court Fee' as provided by Section 12 of said Local Act, he is charged with the Trial Fee of $5.00 as provided by Section 87, Title 11, 1940 Code, and for which the defendant is sentenced to work out at the rate of 75 cents per day. In explanation of this latter charge ($5.00), the Clerk informs me that this was required by the Department of Corrections and Institutions before the cost bills would be paid. We have verified that this statement is correct by examination of Cost Bill in the Case of Mack Lee Bibb, Case No. C-766 in County Court Lawrence County who was charged with the offense of operating a Business without License.

"Certainly there cannot be a field of operation for both the Local Act and the general law in respect to the proper Trial Fee or the so called 'County Court Fee', and advice is necessary to chart the proper course to be followed in the future."

In answer to your first inquiry, I wish to call your attention to the case of **Jackson v. Sherrod,** 207 Ala. 245, 92 So. 481, in which it was held that Section 10 of Act No. 249, Local Acts of Alabama of 1919, p. 88, and Act No. 22, General and Local Acts of 1920, Special Session, page 171, amending said Section 10, in providing as to solicitor's fees in misdemeanor cases in the County Court of Lawrence County, "that in all cases where a plea of guilty was interposed by the defendant no solicitor's fees shall be taxed or collected in excess of the amount of the fine assessed" do not permit an increase of the solicitor's fees in any case in said court, but operate to decrease such fees in cases in which a plea of guilty is interposed and so violates the Constitution of 1901, Section 96, and Section 104, subsection 25, prohibiting special and local laws relating to fees. The **Jackson case** further held that the invalid proviso in Section 10 of Act No. 249, and Act No. 22, supra, as it relates to solicitor's fees in misdemeanor cases did not render the entire Act void.

It is my opinion that the **Jackson case** answers your first inquiry. I might add that the case of **England v. State,** 240 Ala. 76, 197 So. 365, has no bearing upon the question presented in this inquiry.

It, therefore, follows that the Clerk of the County Court of Lawrence County is correct in disregarding the proviso in Section 10 of the 1919 Act, as amended, and charging the solicitor's fees provided in Title 11, Section 85, Code of 1940.

In answer to your second inquiry, it is my opinion that that part of Section 12 of the 1919 Act which provides that "in all cases of a conviction, plea of guilty or a judgment final on a forfeited bond, there shall be taxed against the defendant or defendants, a fee of three dollars, called the 'County Court Fee' and shall be collected by the sheriff as other costs are collected and paid over by him to the Clerk and it shall be the duty of the Clerk to pay the same to the county treasurer of Lawrence County, as soon as collected," is unconstitutional in that it violates Section 96 of the Constitution of 1901, which Section is in part as follows: "The Legislature shall not enact any law not appli-

cable to all the counties in the State, regulating costs and charges of courts, * * *"

The "County Court Fee" provided for in Section 12 of the 1919 Act is very similar to the "Library Tax" under consideration in the case of **Birmingham Electric Co. v. Harry,** 215 Ala. 458, 111 So. 41, in which case the Court said: "The 'library tax' levied by this Act is a **charge upon litigation,** and we can conceive of no plausible reason why it should not be held to fall within the purview * * *" of Section 96 of the Constitution of 1901. See also **Daly v. Johnson,** 225 Ala. 6, 141 So. 909.

The "County Court Fee" under consideration is a charge against the defendant in case of a conviction, plea of guilty or a judgment final on a forfeited bond. However, the unconstitutionality of this provision does not operate to make the remaining provisions of the 1919 Act unconstitutional.

It is, therefore, my opinion that the "County Court Fee" of $3.00 cannot legally be charged as provided in Section 12 of the 1919 Act. It is my further opinion that the fee for trial and entering judgment provided for in Title 11, Section 87, Code of 1940, is a proper charge in the County Court of Lawrence County. Quarterly Report of the Attorney General, Volume 8, page 254.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 26, 1945.

Hon. G. R. Swift

State Highway Director

Highway Department

Montgomery 4, Alabama

Title 23, Section 25, Code of Alabama, 1940—amended by General Acts, 1943, p. 492—Authority of Highway Department—Rules and Regulations—Disbursing agent for cost of right-of-way acquisition.

State Highway Department authorized to promulgate reasonable rules and regulations, or to enter into necessary agreements, for distribution of cost of acquiring right-of-way. State may act as disbursing agent for cost of right-of-way where Federal Aid is involved, to be reimbursed by county or municipality to extent of fifty per cent of such cost.

Opinion by Assistant Attorney General Melton.

Dear Sir:

Your request for an official opinion, bearing date of January 10, 1945, is as follows:

"Reference is made to Title 23, Section 25, of the 1940 Code of Alabama as amended.

"The question as to the proper disbursing agent has arisen in connection with the audits by the Public Roads Administration for the item of right-of-way costs for which Federal reimbursement is claimed by the State.

"It is respectfully requested that you advise us on the following point: Is it permissible for the State to act as disbursing agent for all costs in connection with right-of-way acquisition for a State road or bridge on projects financed in part with Federal Aid funds with the counties' reimbursing the State to the extent of 50 percent of all costs in connection therewith."

The Section of the Code, as amended, to which your request refers reads as follows:

"RIGHT OF WAY FOR ROADS: HOW ACQUIRED.—The right of way being necessary by the highway department for a state road or bridge constructed under the provision of this chapter shall be acquired by the county or municipality in which such road is to be located, and the cost thereof paid, one half by the county or municipality and one half by the state. Should the county or municipality fail or refuse to acquire the necessary right of way, the State Director of the Highway Department shall have authority to acquire such right of way either by purchase or by the exercise of the right of eminent domain in condemnation proceedings as provided under the laws of this state, and one half of the cost thereof shall be a charge against the county or municipality."

Title 23, Section 25, Code of Alabama, 1940 General Acts, 1943, page 492.

In answering your inquiry, it is important and helpful that other sections of the Code of Alabama, 1940, be considered in connection with the one set out above in order to understand the full scope of authority of the highway department in the premises. For all purpose and intent herein the terms "State" and "Highway Department" are considered synonomous, and the Code Sections or parts thereof, in addition to the one above, pertinent hereto are:

Title 23, Section 3—

"Duties and powers of department.—It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this state; . . . ."

Title 23, Section 13—

"General duties of highway department.—The highway department shall cause to be made and kept in its office a general highway map of the state which shall show all state roads. It shall collect information and prepare statistics relative to the mileage, character and condition of the roads and bridges in all counties of the state. It shall investigate and

determine the methods of road construction best adapted to the various sections of the state and shall establish standards for the maintenance of roads and bridges which have been constructed with state aid. It may at all reasonable times be consulted by county and municipal officials relative to any matter relating to the construction of roads and bridges or culverts and the department may also call on all county and municipal officials for any information or assistance it may require and it shall be their duty to supply the same. The highway department shall determine the character and have the general supervision over the construction and maintenance of all the public roads, bridges, and culverts in the state where the funds of the state are used, and shall have a general supervision over the expenditure of any funds apportioned to any county of the state for the construction and maintenance of all public roads, bridges and culverts in each county."

Title 23, Section 26—

"Rules and regulations of department.—The highway department shall have the right and power to adopt all reasonable and necessary rules and regulations for the better construction, repair and maintenance of the public roads and bridges in Alabama which the department shall deem proper. . . . . ."

Title 23, Section 22—

"Contracts with counties, municipalities, etc.—The highway department may enter into contracts with any of the counties of the state, or with any of the municipalities of this state as it may with individuals, firms or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways in this state."

Title 23, Section 35—

"Additional authority of the highway department.—The highway department in addition to the right, authority and powers conferred upon it by this chapter, is authorized to make all such reasonable rules and regulations as the department may deem necessary to carry out the provisions of this chapter, ..."

The above quoted Sections of the Code grant a wide range of authority. This authority includes the power to designate the roads to be constructed, repaired, and maintained; the power to enter into contracts and agreements for such construction and maintenance and for other purposes; the power to secure right-of-ways; the power of general supervision over the expenditure of funds; and the power to issue such rules and regulations as the department may deem necessary to carry out the provisions of these statutes.

Thus, it is seen from the above and foregoing statutes that the highway department is the hub around which the whole wheel of all highway department activities revolves. The hub must, of necessity, be strong, have broad powers, and be kept well oiled and greased for effective and successful turning and operation of the wheel.

It is, therefore, logical to conclude that the highway department has the authority to issue any reasonable rules and regulations or enter into any agreement with reference to disbursing funds, or cost of acquiring right-of-

ways, under the provisions of the above quoted statutes,—the same as it may do in regulating the other phases of the highway department activities.

Authority, Supra

Also, Report of Attorney General, Volume 35, page 79.

This line of reasoning is supported, not only by the authority, supra, but also by other foremost authority. In American Jurisprudence on the question of Public Administrative Law it is said:

> "The necessity for vesting administrative authorities with power to make rules and regulations because of the impracticability of the law makers providing general regulations for various and varying details of management has been recognized by the courts, and the power of the legislature to vest such authority in administrative officers has been upheld as against various particular objections."

American Jurisprudence, Volume 42, page 329.

In addition to what has hereinabove been stated, it is noted that under the provisions of Title 23, Section 25 of the 1940 Code of Alabama, prior to the amendment thereto, the cost of securing right-of-way was borne by the county in which such road was to be located. No state funds whatsoever were involved. The entire cost of securing the right-of-way, whether by state or county, was at expense of the county. This section, as amended by the act of 1943, supra, now provides that one-half of such costs be paid by the county or municipality in which the road is to be located and one-half by the state, without reference to federal aid or source of the cost to be paid by the state. It directs that such right-of-way be acquired by the county or municipality. Provided, that should the county or municipality fail or refuse to acquire the necessary right-of-way, the State Director of the Highway Department shall have authority to acquire such right-of-way either by purchase or by exercise of the right of eminent domain in condemnation proceedings as provided under the laws of this state, and one-half of the cost thereof shall be charged against the county or municipality. In the event the State proceeds to acquire the right-of-way, it can hardly be questioned that the state or highway department, has the authority to pay and disburse the entire amount of cost and in so doing acts as disbursing agent for **all costs** in connection with the acquisition of such right-of-way, even though it is to be reimbursed to the extent of fifty per cent of such costs. Since this is true, it would seem to be as equally permissible under the statute, as amended, for the state to act as disbursing agent for the entire cost under agreement with the county or municipality, or proper rules and regulations issued by the Department, for reimbursement on the part of the county or municipality of one-half of such cost, where acquisition of such right-of-way is by the county or municipality. It is my opinion that it is not the purpose and intent of this Section, as amended, to provide that the state could act as paying or disbursing agent of the cost involved in one instance and forbid it doing so in the other. In both instances, state funds are involved. In either instance, the county or municipality would suffer no detriment or loss of credit or of funds through the action of the state in disbursing the cost.

It is, therefore, my opinion that your inquiry should be answered in the affirmative.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 26, 1945.

Hon. D. C. Nix

Sheriff, Franklin County

Russellville, Alabama

Inferior Courts—Franklin County—Costs and Fees—Sheriffs—Attendance Fee—Appeal bonds—Misdemeanor cases—Title 11, Section 34; Title 15, Section 374; Code of Alabama 1940—Local Acts of 1923, page 272—General Acts of 1943, page 576.

1. The sheriff is not entitled to fee for attending the law and equity court of Franklin County.

2. Sheriff is authorized to approve bail bonds in appeals from convictions for misdemeanors and to collect fee of $1.00 for approving such bonds.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of December 15, 1944, is as follows:

"Under Section 14 of the Local Acts of Alabama of 1923 page 275, creating the Law & Equity Court of Franklin County, Alabama, the sheriff of Franklin County is required to attend in person or by his deputies all the sessions of said court and to perform all duties as in Circuit Courts of this state, but said section provides that he shall not receive any compensation for said attendance.

"Under General Acts of 1943, Page 576 we have a new law which provides that all sheriffs shall receive the same fees for attendance upon non-jury civil courts as are now paid for jury civil courts and the same fees for jury and non-jury criminal courts as are now paid for attending upon civil jury terms of the Circuit Court.

"My contention is, that this 1943 Act repeals that part of the Franklin County Local Act, where it says the sheriff shall not be compensated for attending upon the Law & Equity Court. I am aware of the opinion by Assistant Attorney General Arbuthnot, which is found in Vol. XXXIV of February 28, 1944, addressed to Hon. B. G. Farmer, Sheriff, Houston

County, Dothan, Alabama, where it was held that the sheriff was not entitled to his attendance upon the Court of Common Pleas of Dothan, Alabama. I agree with you on this opinion because the law does not require the sheriff to attend upon this court. The law does require the sheriff of Franklin County to attend upon the Law & Equity court, which has jury and non-jury sessions, both civil and criminal. I have been collecting my attendance in our Law & Equity Court and I shall thank you for your opinion, as to whether or not I am entitled to the same.

"Also, I would like your opinion on the following:

"Under Title 15, Section 372 of the Code of 1940 it has been undisputed that it is the duty of the Circuit Clerk to approve the appeal bond in the case of a felony. Under Section 374 of the same title where it is a misdemeanor, it says the defendant may give bail, etc. It has been the custom, and our judges have always directed the sheriffs to take and approve these appeal bonds in all misdemeanors, for which we have collected a fee of one dollar. I shall thank you for your opinion on both of these questions at an early date."

The Law and Equity Court of Franklin County was created by Local Act No. 404, Local Acts of 1923, page 272, Section 14 of which Act provides in part as follows:

"Section 14. The sheriff of Franklin County shall in person, or by a deputy, or deputies appointed by him said appointment to be approved by the Judge of said court, be required to attend upon the said court, and preserve order, and execute all writs or process, and perform such other duties, in all respects as in the Circuit Courts of this State, and for such services of attending said court the sheriff or his deputies shall not receive any compensation. * * * * *"

Under the provisions of Title 11, Section 34, Code of 1940, before the passage of Act No. 573, General Acts of 1943, page 576, the Sheriff was entitled to a fee for "attendance upon the probate court when a jury is in attendance, and upon the circuit court when a jury is in attendance, * * *" but he was not entitled to a fee for attending nonjury criminal or civil terms of the circuit court, nor the probate court where no jury was in attendance. Quarterly Report, Volume 23, page 148; Quarterly Report, Volume 34, page 38.

It will be seen from an opinion of this office to Hon. B. G. Farmer, Sheriff of Houston County, rendered under date of February 28, 1944, Quarterly Report, Volume 34, page 38 (the opinion referred to in your request) that the "sole purpose of Act No. 573 was to allow the sheriffs the same fees for attending nonjury civil courts as were allowed them for attending jury civil courts, and the same fee for attending jury and nonjury criminal courts as were paid them for attending civil jury terms of the citcuit court * * *."

Act No. 573, supra, allows the sheriff the same fee for attending nonjury civil courts as is now paid for attending jury civil courts and the same fee for attending jury and nonjury criminal courts as he is now paid for attending civil jury terms of the circuit court. Inasmuch as the provisions of Section 14, supra, expressly provide that the sheriff shall not receive any compensation for attending the Law and Equity Court of Franklin County, it is my opinion that Act No. 573, supra, cannot be construed as allowing the sheriff a fee for attending said court.

If, under the provisions of Act No. 404, supra, the sheriff was entitled to a fee for attending the Law and Equity Court of Franklin County when a jury was in attendance, a different light would be cast upon your inquiry.

In answer to your second inquiry, I wish to advise you that I am informed by the Chief Examiner of Public Accounts that for many years it has been the practice of the sheriff to approve such bonds in misdemeanor cases, and that office has never charged back to the sheriff the fee of $1.00 collected for approving such bonds. This is an administrative construction placed on Title 15, Section 374, Code of 1940, and such construction placed upon the statute by an administrative official or department is entitled to great consideration, "and especially would this be true if this construction or interpretation had prevailed for a considerable period of time." **State v. Tuscaloosa Building and Loan Association,** 230 Ala. 472, 161 So. 530, and cases cited therein. Section 374 has been incorporated in the Code of Alabama since 1852 and came into the Code of 1940 with the construction by the Department of Public Accounts impressed upon it, which construction is entitled to great consideration. For this reason, I am not inclined at this time to change the administrative construction placed upon Section 374 of the Department of Public Accounts.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 6, 1945.

Hon. Edgar Underwood

Judge of Probate

Franklin County

Russellville, Alabama

Code 1940, Title 51, Sections 618, 619—Filing Tax—Code 1940, Title 37, Section 267—Municipal Corporations—Water Works Plants—

1. Conveyance to a municipal corporation of a water works plant is exempt from the deed filing tax.

2. Mortgage or trust indenture by municipal corporation, securing bonds issued in connection with purchase of a water works plant, is exempt from the mortgage filing tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of February 27, 1945, is as follows:

"On February 26th, 1945 the City of Russellville, Alabama filed in my office a deed of conveyance to it from Alabama Water Service Company,

dated February 17th, 1945 conveying 'all and singular the plant system and property of Alabama Water Service Company owned by it and used or useful in connection with its plant and system of water works situated in the City of Russellville, Alabama, and territory contiguous thereto in Franklin County, Alabama, including all pumps, machinery, pipe lines, hydrants, services, meters, valves, intake tools. one 1941 Chevrolet Pickup Truck, office furniture and equipment; also all wells, reservoirs, tanks, towers and pumping stations thereon or appurtenant thereto'. Also there is described in said deed two parcels of land situated without the City limits of Russellville, one being several miles from town; also franchises, permits, etc. under which the grantor has operated the water works system.

"The deed recites a consideration of $110,000.00 cash in hand paid by the City of Russellville. The City claims that this deed is not subject to the deed tax of 50 cents on each $500.00 of consideration. On the same date the Birmingham Trust and Savings Company, a corporation under the laws of the State of Alabama filed its first mortgage describing therein the same property as that described in said deed securing bonds in the principal amount of $125,000.00. Said mortgage being executed by City of Russellville on February 24, 1945.

"The mortgagee claims it is not due the tax of 15 cents per $100.00 on said mortgage because it is exempted under Code Title 37, Section 267.

"Please advise me whether or not I should collect the said deed tax on said deed.

"Please advise me whether or not I should collect the said mortgage tax on said mortgage.

"I am wondering if the property described in the mortgage is 'public property' within the purview of said statute.

"I believe the facts stated herein substantially cover the proposition but if my statement thereof is not full, please write me, and oblige."

The conveyance by Alabama Water Service Company of its water works plant to City of Russellville is not in my opinion subject to the deed filing tax imposed by Code 1940, Title 51, Section 618. Opinions of Attorney General, Quarterly Reports, Vol. 24, page 55; Vol. 14, page 166; Vol. 4, page 28.

Likewise, the mortgage or deed of trust executed by City of Russellville to secure its bonds issued in connection with purchase of said water works plant is exempt from the mortgage filing tax imposed by Code 1940, Title 51, Section 619. **Code 1940, Title 37, Section 267.**

Said Section 267, Title 37, was first enacted as Section 63 of Act No. 478, S. 193, approved September 10, 1927, (General Acts 1927, pages 534, 550, Section 63). In an opinion rendered February 28, 1936, quarterly Reports Attorney General, Volume 2, page 238, this office held that Section 63 of said Act No. 478, had been repealed by Section 368½ of the Revenue Act of 1935, (Acts 1935, pages 256, 564, Section 368½), and that, therefore, such a mortgage

or trust indenture was subject to the mortgage filing tax. To the same effect was the opinion of this office rendered March 2, 1939, to Judge of Probate, Chilton County (Quarterly Report, Volume 14, page 166).

It is to be observed, however, that the original provision of the Act of 1927, exempting such mortgages from the filing tax, was reenacted into the Code of 1940 and is not, therefore, controlling with reference to the question involved. Nor am I able to find that Section 368½ of the Revenue Act of 1935 was reenacted or carried into the Code of 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 19, 1945.

Hon. E. T. Knight, Chairman

Cullman County Board of Revenue

Cullman, Alabama

Cullman County cannot purchase a nurses' home to be used in connection with county-municipal hospital.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of February 23, 1945, is as follows:

"Please advise us if it would be legal for the County of Cullman to use money now in the Hospital and Public Building Fund for the purpose of a nurse's home. When the hospital was built it was authorized by an election for the purpose of issuing bonds to finance it and by a local law enacted in 1939 to create hospital board. One mill was levied to cover this cost out of the 2½ mill which is allowed by the constitution for public roads, bridges, and buildings. Under date of April 27, 1944 the Hon. William N. McQueen ruled that this one mill could be divided to purchase public property on which to build a new courthouse at a later date. The tax levy now reads:

" 'To provide funds to retire the principal of $48,000.00 of Hospital Bonds and to pay interest coupons as they mature on same, ½ mill.'

"It has always been our understanding that any money levied for a particular purpose could be used only for whatever the levy was made or transferred to the road and bridge fund. However, if it is legal to use this money which we now have in the Hospital Fund for the purpose of purchasing a nurse's home would it be legal to use money out of the hospital fund to make whatever changes that are necessary in the house

and also would it be legal to use hospital money to furnish it with the necessary beds and other furniture in order that the nurses might live in it. The home is not on the property with the hospital but is an entirely new piece of property and is located across the street. The hospital is owned 60% by the County and 40% by the City of Cullman and the city of Cullman would pay 40% of the cost of the nurse's home.

"Please give us a ruling on this at the earliest possible date as we are being pressed for some action and we do not wish to take any until your ruling is received."

In my opinion Cullman County does not have authority to purchase a nurses' home to be used in connection with the county-municipal hospital.

Authority for county acquisition, control and management of hospitals is found in Section 189, Title 22, Code of 1940, and aditional authority is found in Section 185, Title 12, Code of 1940. The former also authorizes the making of such hospitals "common for the use of a town, city and county." However, I am unable to find any provision, either express or by necessary implication, which will permit acquisition of a nurses' home.

"A county possesses only such power to acquire and hold property as is specifically granted or as is necessary to carry into effect its express powers." See 20 Corpus Juris Secundum, page 992.

This office has consistently held that public funds, subject to control of a county governing body, cannot be expended except where authorized by law or necessary implication of law. See the following Quarterly Reports of the Attorney General: Vol. 34, p. 48; Vol. 33, p. 120; Vol. 32, p. 114; Vol. 27, p. 72; Vol. 30, p. 97; Vol. 31, p. 88. While none of these opinions deal with the acquisition of a nurses' home, nevertheless each deals with an unauthorized expenditure of public funds.

It appears to me that while a nurses' home is a convenient adjunct to the hospital, it is never a necessary part therof. I must, therefore, hold that the Cullman County Board of Revenue is without authority to purchase same.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 20, 1945.

Hon. T. G. Gayle

County Attorney

Dallas County

Selma, Alabama

Highways—Abandonment—

Where a right of way or easement of passage for a public road is granted by deed to a county over the grantor's land mere nonuser by the public of such right of way, however, long continued, will not operate to divest the county and the public of the right to such easement in the absence of the assertion of some claim by the owner of the servient estate hostile to the existence of the right.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 2, 1945, is as follows:

"In compliance with our telephone conversation of today, I am writing you to request an opinion from your Department on the following matters, namely:

"1. Whether a road which has not been formally closed in compliance with Chapter 3, Title 56 of the 1940 Code, but has not been used by the county for a period of approximately 20 years, does this constitute an abandonment by the county?

"2. Where a county road under a right of way deed has been abandoned to whom does the title revert? Whether to the adjoining land owners or to a land owner if all of the right of way is on one party's land?

"3. Can a county convey its right of way under a right of way deed to an individual?"

From your statement I assume that the county road in question was created by deed granting to the county a right of way or easement of passage merely over the grantor's land some twenty years or more ago, and that such deed did not purport to convey any fee simple estate in any of the grantor's land. That is a matter, of course, which can be determined only upon inspection of the deed.

Under these circumstances and in the absence of anything to show that the grantor or his successors in title have asserted any claim adverse to the existence of the right of way, I am of opinion that mere nonuser by the public of the right of way or failure on the part of the county authorities to take any action with reference thereto does not operate to destroy the continued existence of the easement or divest the county of its right thereto.

In such case there is no reversion of any title to the adjoining land owners or to the owners of the servient estate by reason merely of failure on the part of the public to exercise its right.

The county holds the right of way in trust for the public, and cannot therefore convey the same to any individual or private person.

I find no Alabama authorities directly in point, but for a discussion of the general principles involved reference is made to 25 **Am. Juris.**—Highways—Sections 112, 132, 133, 143. See also 39 **C. J. S.**,—Highways—Sections 130, 131.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 20, 1945.

Hon. Roy Sanderson

Judge of Probate

Marion County

Hamilton, Alabama

Courts of County Commissioners—County Service Commissioner—General Acts of Alabama of 1943, page 587.

Proceedings by the Court of County Commissioners creating the office of County Service Commissioner and appointing such Commissioner are not illegal because of the fact that the term of office of two of the County Commissioners taking part in such proceedings expired before the period for which the Service Commissioner was appointed expires.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of March 13, 1945, is as follows:

"The commissioners court of Marion County, at a meeting March 12, 1945 passed a motion to have me, Roy Sanderson, Judge of Probate, for said county, submit to you a transcript of the minutes of the court proceedings of Oct. 9, 1944.

"Asking you to rule on the action of the court as outlined by the minutes, which are as follows:

"Mr. Young and Mr. Holloway, were going out of office Jan. 16, 1945. The questions are thus: Is this action legal and proper?

"Commissioner Holloway made a motion that a service commissioner be appointed for Marion County, and that the sum of $1800.00 be appropriated out of the general fund for the maintenance of this office for the next succeeding 12 months and that the office be located at Hamilton, Ala. and Mr. Young seconded the motion, and a vote being had on the matter, and all members present voting in the affirmative, it was ordered, adjudged and decreed that a service commissioner be selected.

"A motion was made by Mr. Young, and seconded by Mr. Holloway, that Houston Terrell, of Hamilton, Ala. be selected for said service commissioner for a period of 12 months at a salary of $150.00 per month, beginning with the month of October 1944, and a vote being had on said motion and all members voting in the affirmative, except Mr. Davis, who did not vote, it was ordered, adjudged and decreed that the said Houston Terrell be selected for said service commissioner for a period of 12 months beginning October 1, 1944.

"There being no further business to come before the court a motion was ordered and decreed that a recess be had, and that the court meet again October 16, 1944.

"This $1800.00 appropriated was set up in the October Budget, 1944. This action was made in compliance with law passed by the 1943 Legislature No. 586, An Act, H. 256 Segrest."

The question presented by your inquiry is whether or not the proceedings of the Commissioners Court of Marion County on October 9, 1944, creating the office of County Service Commissioner for Marion County and appointing such Service Commissioner is legal, in view of the fact that the term of office of two of the County Commissioners taking part in such proceedings expired January 16, 1945, the term of the Service Commissioner so appointed being for a period expiring September 30, 1945.

There is no statutory provision which would invalidate the proceedings of the Commissioners Court under consideration. The question then arises as to whether such proceedings are void as contrary to public policy in that such proceedings usurp the power of a succeeding administration.

In the case of **Corning v. Patton**, 236 Ala. 354, 182 So. 39, it was held that a 50-year lease between the County Commissioners of Jefferson County of a former court house site was not void on the ground that it was contrary to public policy in that it extended beyond the term of the Commission making the lease and usurped the power of a suceeding Commission. The decision in this case contains the following quotation from 12 Ann. Cas. 988:

" 'The holding of the reported case that a contract extending beyond the term of office of the members of a board of county commissioners is, if made in good faith, ordinarily valid, is supported by a number of decisions. Liggett v. Board of Com'rs of Kiowa County, 6 Colo. App. 269, 40 P. 475; Board of Com'rs of Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385; Webb v. Spokane County, 9 Wash. 103, 37 P. 282. See, also Reubelt v. Noblesville, 106 Ind. 478, 7 N. E. 206; Wait v. Ray, 67 N. Y. 36. The ground upon which these decisions is based is that a board of county commissioners is a continuously existing corporation. Consequently it

has been said: "While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason. As individuals they are not parties to it." Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385. As to the necessity of upholding such contracts, it has been said: "Many contracts can be conceived and suggested which of necessity could not be performed during the term of office of an entire board of county commissioners. To hold contracts invalid because part of all of a board cease to exercise public functions would be to put these corporations at an enormous disadvantage in making the contracts which are essential to the safe, prudent, and economical management of the affairs of a county." Liggett v. Kiowa County, 6 Colo. App. 269, 40 P. 475. See, also, Whedon v. Lancaster County, 1908, (80 Neb. 682), 114 N. W. 1102."

It is my opinion that the question under consideration comes within the scope of the opinion in the Corning Case. It, therefore, follows that the proceedings of the Court of County Commissioners of Marion County as set out in your request are valid.

Cf: Quarterly Report of Attorney General, Volume 12, page 124.

Quarterly Report of Attorney General, Volume 32, page 25.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 20, 1945.

Hon. Jas. T. Beeland

Judge of Probate

Butler County

Greenville, Alabama

SHERIFFS—

EXPENSES FOR INVESTIGATION OF CRIMES—

1. The sheriff in making investigations under Title 54, Sections 9 and 10 of the Code of Alabama, is not entitled to pay by the county for expenses incurred in a funeral home or elsewhere by the State Toxicologist performing an autopsy.

2. The sheriff is not authorized under this title and sections to be paid by the county for the expenses of having someone make photographs of the scene of the crime.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of March 14, 1945, is as follows:

"The Sheriff of Butler County has filed a bill with the Commissioners Court for expenses in investigating a murder, which investigation was done upon written order of the Circuit Solicitor to the Sheriff directing him to make the special investigation in accordance with Title 54, Sec. 9 & 10, of 1940 Code of Alabama. The Sheriff's report sets out that Dr. Rehling, Senior Toxicologist of Auburn, performed the autopsy in the investigation and in connection with the autopsy the sheriff has filed a bill of $25.00 to be paid to Johnson Funeral Home in which funeral home the autopsy was performed by Dr. Rehling.

"It is my knowledge that a doctor is entitled to certain fees in assisting the sheriff in making special investigations (Title 15, Section 88 of 1940 Code of Alabama), but your advice as to the legality of a claim from a funeral home in connection with the sheriff's expenses in special investigations ordered by the Circuit Solicitor would be greatly appreciated.

"Also please advise me whether or not a reasonable charge for having pictures made in this same investigation of the murder would be a legal charge by the sheriff against the county.

"An early reply to these questions would be appreciated."

Two fundamental principles of law must be kept in mind in answering your questions: First, the law of fees and costs must be held to be penal and no fee or cost must be demanded, paid or reecived except expressly authorized by law. **Code** 1940, Title 11, Section 1. An officer demanding fees for services rendered must point to some clear and definite provision of law which

authorizes the demand, and the compensation cannot be allowed unless it is conferred by a strict construction of the language employed in the statute, and the statutes giving costs and fees must not be extended beyond their letter.

Second, those who accept public offices which require them to render services to the state must take the office **cum onere.** The rendition of such services is gratuitous unless by express statutory provision compensation is fixed and an express liability for its payment imposed.

These principles are stated with great force and accuracy in two cases by our Supreme Court: **State ex rel T. C. Pollard v. Willis Brewer,** 59 Ala. 130; **Torbit v. Hale County,** 131 Ala. 143.

Title 54, Sections 1-27 of the Code of 1940 deal with some of the duties and rights of sheriffs. Section 5 of this title catalogues duties of sheriffs where under Sub Section 4 it is made the mandatory duty of the sheriffs "by themselves or deputies to ferret out crimes." "And so far as within their power to secure evidence of crimes." And "present a report of the evidence so secured to the solicitor." This is strong language and lays an exacting duty upon the sheriff. A full performance of his duties requires this to be done. The word "ferret" means "to search out with keenness; to draw out by shrewd questioning." All this must be done without compensation, for the law makes no provision for performance of such duties. These named duties fall within the second principle of law set forth above.

It is difficult to see the necessity for Section 9 of this same title, to which you refer. It lays, to all intents and purposes, the same mandatory duties required of sheriffs under Section 5. This section (9) substitutes for the words "ferret out" used in Section 5 the words "special investigation." "Investigation" means to ascertain by careful inquiry, or search or examination. If there is any difference in the duties required of the sheriff the duties in Section 5(4) are the more exacting and inclusive.

This brings us to Section 10, Title 54, to which you refer. This Section provides compensation to the sheriffs for the duties which Section 5(4) required them to do without compensation. The question arises at once, What is the nature of the service for which compensation is allowed? Section 9 says the sheriffs, when directed by named officers, "shall make special investigations * * * and shall prepare written reports setting forth what information has been obtained as a result of such investigation."

Sections 5 and 9 are laying an obligation on the sheriff to act in a manner named. He is not directed to perform these duties by some outside parties. These duties are, in their very nature, in a sense purely personal, and he cannot delegate the same.

Section 10 follows this same thought when it says "the expense of such investigation shall be paid from the county treasury. This idea is further enforced by what follows the above language. It is provided that the sheriff shall file a detailed, sworn statement of **his expenses,** not the expenses of someone not directed to investigate, not someone the sheriff delegates to perform the duties he was directed to do. To illustrate the thought it may be

said that all these duties could be more adequately and efficiently performed by the F. B. I., but that does not argue or authorize the sheriff to call on that organization to do what he is directed to do and send in a bill to the county to pay for such services.

Title 15, Section 88 providing for compensation of physicians and surgeons appearing before a coroner's investigation, has no application to the questions now under review, nor do the activities of the State Toxicologist, under Title 14, Sections 387-390 apply.

From the foregoing we conclude that the sheriff is not entitled to expenses incurred in the use of a funeral home by the State Toxicologist in the performance of an autopsy under the circumstances stated in your letter, nor is the county authorized to pay the same. The same is true as to the claim filed by the sheriff for expenses of having photographs made in the investigation set forth in your letter.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 20, 1945.

Hon. J. S. Benson

Judge of Probate

Jackson County

Scottsboro, Alabama

Local Acts 1939, p. 368—Jackson County Court—Code 1940, Title 41, §§ 2, 16—Acts 1942, Extra Session, p. 9,—Temporary Acting Judges—

Temporary acting judge in lieu of elected judge of Jackson County Court is entitled to hold over and be compensated for his services until his successor is both appointed and accepts appointment and qualifies as such successor.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 14, 1945, is as follows:

"Hon. Robert E. Jones, while serving as Judge of the County Court of Jackson County was inducted into the Navy some time during 1944. Hon. John K. Thompson was appointed by the Governor to fill the vacancy, according to the 1943 act of the Legislature. In the November election, Judge Jones was elected for a term of 4 years, beginning January 15, 1945. During February 1945, the Governor appointed Hon. H. O. Weeks

to serve as Judge, until Judge Jones was released from the Navy, but has never qualified.

"As Chairman of the Board of Commissioners, I was advised not to pay Judge Thompson for the Month of February.

"I am asking your opinion in the matter. The question with me is: 1st, did Judge Thompson's term expire with Judge Jones' term or does he serve until his successor is qualified?

"Your immediate opinion in this matter is urged."

The Act creating the Jackson County Court provides that its judge's "term of office shall be for a period of four years." Act No. 647, S. 379, approved July 10, 1940, (Local Acts 1939, p. 368, § 1).

On the other hand the general provision of law with respect to holders of judicial office, including circuit judges and judges of inferior courts, "when not otherwise provided for by law," is that they "shall hold their respective offices for the term of six years * * * **and until their successors are elected and qualified.**" (Emphasis supplied) **Code 1940,** Title 41, § 6.

No good reason is apparent why judges of the Jackson County Court should be excepted from operation of the general rule as to holding over **"until their successors are elected and qualified,"** in the absence of express statutory provision to that effect in the act creating the office. The general rule is salutary and in fact necessary to prevent a hiatus in the office. In such cases it is said: "He merely performs the functions of the office until a duly qualified appointee to it appears, and is then bound to yield the office to such appointee, and his incumbency does not prevent a vacancy of the office or the filling of the vacancy." 30 Am. Jur.—Judges p. 734, § 15. See also **Code 1940,** Tit. 41, § 2; **Stephens v. Davis,** 39 So. 831, (Ala. Sup. Ct., 1905)

With reference to public officers generally it is said: "Apart from any constitutional or statutory regulation on the subject, there seems to be a general rule that an incumbent of an office will hold over after the conclusion of his term until the election and qualification of a successor, and this notwithstanding a provision rendering one elected to an office ineligible to succeed himself." 43 Am. Jr. p. 20, § 162.

The obvious intent of Act No. 2, H. 4, approved November 20, 1942 (Gen. Acts 1942, Extra Session p. 9) was to provide "temporary acting officials" in lieu of elected or appointed officials leaving office for military service, and to enable such temporary officials to discharge their official duties and to be compensated for their services as effectually as those from whom they were substituted.

In the present instance it appears that Hon. H. O. Weeks has not qualified as acting judge, appointed in lieu of Hon. Robert E. Jones for his second term, and that Hon. John K. Thompson is holding over by reason of his appointment as acting judge for Judge Jones' first term, and at least occupies the status of judge de facto of the Jackson County Court, and possibly judge de jure, until his successor as acting judge is not only appointed, but also accepts office and qualifies by taking the oath of office.

I am of opinion therefore that Judge Thompson should be compensated for his services as such judge for the month of February inasmuch as no successor has qualified.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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